# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. [redacted] 113.

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THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK, PLAINTIFF IN ERROR,

vs.

R. ROSS APPLETON, AS RECEIVER OF THE COOPER EXCHANGE BANK.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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FILED APRIL 3, 1908.

(21,090.)

(21,030.)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1907.

## No. 687.

THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK, PLAINTIFF IN ERROR,

*vs.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

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a Court of Appeals, State of New York.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Plaintiff-Appellant,

*against*

The Citizens' Central National Bank of New York, Defendant-Respondent.

Case on Appeal.

John W. Hutchinson, Jr., Attorney for Appellant, 37 Wall Street, New York.

Shearman & Sterling, Attorneys for Respondent, 44 Wall Street, New York.

1 Supreme Court, Appellate Division, First Department.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Plaintiff,

*against*

The Citizens' Central National Bank of New York, Defendant.

*Statement Under Rule 41.*

This action was commenced by the service of a summons and complaint on the 9th day of April, 1906.

On the 12th day of April, 1906, the defendant served a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on the 17th day of April, 1906, the plaintiff served an amended complaint.

On May 7th, 1906, the defendant served a demurrer to the said amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

On July 11th, 1906, an interlocutory judgment was entered overruling said demurrer with leave to the defendant to answer
2 to the amended complaint upon the payment of costs. From this interlocutory judgment the defendant appealed to the Appellate Division of the First Department.

On the 21st day of December, 1906, the Appellate Division handed down an opinion reversing the interlocutory judgment with leave to the plaintiff to serve an amended complaint upon the payment of costs.

On the 29th day of January, 1907, the plaintiff served a second amended complaint.

On the 18th day of February, 1907, the defendant served a demurrer to the second amended complaint on the ground that the said second amended complaint did not state facts sufficient to constitute a cause of action.

On the 23d day of March, 1907, a final judgment was duly entered dismissing the plaintiff's second amended complaint. From the

judgment dismissing the plaintiff's second amended complaint herein the plaintiff appeals.

The names of the parties are fully set forth in the title hereto.

There has been no change of parties or attorneys since the commencement of this action.

John W. Hutchinson, Jr., appears herein as attorney for the plaintiff, and Shearman & Sterling, Esqs., appear as attorneys for the defendant.

3 *Notice of Appeal.*

Supreme Court, New York County.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Plaintiff,
*against*
The Citizens' Central National Bank of New York, Defendant.

Notice of Appeal.

Sir: Please take notice that the plaintiff hereby appeals to the Appellate Division of the Supreme Court, for the First Department, from a judgment in favor of the defendant and against the plaintiff for the sum of forty-seven and 50/100 dollars ($47.50) sustaining the demurrer of the defendant to the plaintiff's second amended complaint herein, and dismissing the second amended complaint of the plaintiff, said judgment having been duly entered in the office of the Clerk of the County of New York on the 23d day of
4 March, 1907, and the plaintiff hereby appeals from each and every part of said judgment.

Dated New York, April 2d, 1907.

Yours &c., JOHN W. HUTCHINSON, Jr.,
*Attorney for Plaintiff.*

Office and Post Office Address, 170 Broadway, Borough of Manhattan, New York City.

To Peter J. Dooling, Esq., Clerk of the County of New York, and Shearman & Sterling, Esqs., Attorneys for Defendant.

5 *Summons.*

Supreme Court, County of New York.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Plaintiff,
*against*
The Citizens' Central National Bank of New York, Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of

the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint. Trial desired in the County of New York.

Dated April 7th, 1905.

JOHN W. HUTCHINSON, JR.,
*Plaintiff's Attorney.*

Office and Post-Office Address, 170 Broadway, Borough of Manhattan, New York City, N. Y.

6 *Second Amended Complaint.*

Supreme Court of the State of New York, County of New York.

R. Ross APPLETON, Receiver of the Cooper Exchange Bank, Plaintiff,
*against*
THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK,
Defendants.

The plaintiff above named by John W. Hutchinson, Jr., his attorney, complaining of the defendants, respectfully shows unto the Court:

I. On information and belief, that at all the times mentioned herein prior to November 16th, 1905, the Cooper Exchange Bank was a domestic banking corporation organized and existing under and by virtue of the laws of the State of New York.

II. That by an order and judgment of the Supreme Court of Albany County, duly entered on the 16th day of November, 1905, in the office of the Clerk of Albany County, the said Cooper Exchange Bank was dissolved, and the plaintiff, R. Ross Appleton, was duly appointed Receiver thereof. That he duly qualified and entered upon the discharge of his duties as such Receiver. That he ever since has been and now is such Receiver, and entitled as such to all the assets of the said Cooper Exchange Bank.

7 III. That at all times mentioned herein, prior to the 12th day of March, 1904, The Central National Bank of the City of New York was a banking corporation, incorporated under the National Banking Act of the United States, with its office and place of business in the City of New York.

IV. That on or about the said 12th day of March, 1904, the said The Central National Bank of the City of New York was consolidated with the National Citizens' Bank of the City of New York, pursuant to Sections 5220 and 5221, United States Revised Statutes, under the name of The Citizens' Central National Bank of New York, and that the said The Citizens' Central National Bank of New York, succeeded to all the assets and liabilities of the said The Central National Bank of the City of New York.

V. That on or about the 4th day of January, 1904, Cooper Exchange Bank, at the instance and request of one Mikael Samuels, trading under the name of Mikael Samuels & Co., and the Central

National Bank of the City of New York, did loan and advance unto the said Mikael Samuels the sum of twelve thousand dollars ($12,000).

VI. That, upon said loan and advance of money, to wit: on said 4th day of January, 1904, the said Mikael Samuels did execute and deliver a certain instrument in writing, bearing date on that day, wherein and whereby he acknowledged indebtedness to the said Cooper Exchange Bank of the said sum of twelve thousand dollars ($12,000), and agreed to return or repay the same on or before four months after said date, with interest; and the said The Central National Bank of the City of New York did then and there, in writing, promise and agree, on the same day and year, and guarantee unto the said Cooper Exchange Bank the performance of the obligation before mentioned on the part of the said Mikael Samuels, and the said acknowledgement of debt by the said Mikael Samuels, and the said guaranty to pay the same by the said The Central National Bank of the City of New York, were, upon the loan of the said sum of twelve thousand dollars ($12,000) by the said Cooper Exchange Bank, duly delivered and transferred to it, the said Cooper Exchange Bank; that the said guaranty is in words and figures following, to wit:

8

"For and in consideration of one dollar and other good and valuable considerations, the Central National Bank of the City of New York, hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of twelve thousand dollars, made this day to Mikael Samuels & Co., by the Cooper Exchange Bank.

[Seal the Central National Bank of the City of New York.]

THE CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK,
By EDWIN LANDON, *Prest.*"

VII. That on and prior to the 4th day of January, 1904, the said Mikael Samuels was indebted to the said Central National Bank in the sum of ten thousand dollars ($10,000).

VIII. That the said Mikael Samuels had, previous to the obtaining of the said loan of twelve thousand dollars ($12,000), agreed with the said Central National Bank to pay to it the said sum of ten thousand dollars ($10,000) of the said sum of twelve thousand dollars ($12,000) so obtained, and the said loan was obtained by the said Mikael Samuels and was guaranteed by the said Central National Bank in order that the said Central National Bank might obtain the said sum of ten thousand dollars ($10,000), which it did receive and which was owed to it by the said Samuels.

9

IX. That previous to the maturity of said loan, and on or about the 30th day of January, 1904, the said Mikael Samuels was duly adjudicated a bankrupt in the District Court of the United States for the Southern District of New York, of which fact the said The Central National Bank of the City of New York had notice.

X. That the said sum of twelve thousand dollars ($12,000) was not paid by the said Mikael Samuels on the day when it was pay-

able, to wit, on the 4th day of May, 1904, nor was any part thereof paid by anyone on his account, except the sum of one thousand dollars ($1,000), which was paid on the 7th day of April, 1905, of which fact the said The Central National Bank of the City of New York and the defendant had notice.

XI. That the said sum of eleven thousand dollars ($11,000) is still due and unpaid, with interest on $12,000 from the 4th day of January, 1904, to the 7th day of April, 1905, and on $11,000 from the 7th day of April, 1905.

Wherefore, the plaintiff demands judgment against the defendant for the sum of eleven thousand dollars ($11,000), with interest on $12,000 from the 4th day of January, 1904, to the 7th day of April, 1905, and on $11,000 from the 7th day of April, 1905, together with the costs and disbursements of this action, and for such other and further relief as to the Court may seem just.

JOHN W. HUTCHINSON, JR.,
*Attorney for Plaintiff*, 170 *Broadway*,
*Borough of Manhattan, New York City.*

10 STATE OF NEW YORK, *County of New York, ss:*

John W. Hutchinson, Jr., being duly sworn, deposes and says: That he is the attorney for R. Ross Appleton, Receiver of the Cooper Exchange Bank, the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and knows it to be true except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by the plaintiff is that the action is founded upon a written instrument, for the payment of money only, which is in the possession of deponent.

JOHN W. HUTCHINSON, JR.

Sworn to before me this 29th day of January, 1907.
HARRY B. SAWIN,
*Notary Public, N. Y. Co.*

11 *Demurrer.*

Supreme Court.

R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank,
*against*
THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK.

Demurrer.

The defendant demurs to the second amended complaint herein upon the ground that, as appears upon the face thereof, the said

second amended complaint does not state facts sufficient to constitute a cause of action.

New York, February 18th, 1907.

Yours, &c., SHEARMAN & STERLING,
*Attorneys for Defendant, 44 Wall Street, New York City.*

12 *Decision.*

Supreme Court.

R. Ross Appleton, Receiver of the Cooper Exchange Bank,
*against*
The Citizens' Central National Bank of New York.

Decision.

The issue of law raised by the demurrer of the defendant to the second amended complaint herein having come on for trial before the undersigned, at a Special Term of this Court, Part V thereof, on March 7, 1907, the defendant having claimed that the contract alleged in the said complaint was void, because, under the National Bank Act, the Central National Bank of the City of New York, the defendant's assignor, was without power to make the said contract;

Now, after hearing John A. Garver, of counsel for the defendant, in support of the demurrer, and John W. Hutchinson, Jr., Esq., of counsel for the plaintiff, in opposition thereto, I decide and find as follows:

I. That under the National Bank Act the said Central National Bank of the City of New York, the defendant's assignor, was without power to make the contract alleged in the said complaint, and the said contract is *ultra vires* and void.

II. That it therefore appears upon the face of the said complaint that the same does not state facts sufficient to constitute a cause of action.

III. That the defendant is entitled to a final judgment
13 herein, sustaining the demurrer and dismissing the complaint, with costs.

And I direct judgment to be entered accordingly.

New York, March 19, 1907.

J. A. O'GORMAN, *J. S. C.*

Approved as to form.

JOHN W. HUTCHINSON, Jr.,
*Attorney for Plaintiff.*

SHEARMAN & STEARLING,
*Attorneys for Defendant.*

*Judgment.*

Supreme Court, New York County.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Plaintiff,
*against*
The Citizens' Central National Bank of New York, Defendant.

Final Judgment.

This action having been brought to trial at a Special Term of this Court, Part V thereof, before Honorable James A. O'Gorman, one of the Justices thereof, upon the issue of law raised by the demurrer of the defendant to the second amended complaint
14 herein, and the said Justice having duly filed his decision sustaining the demurrer, and the costs of the defendant having been taxed at $47.50; now, on motion of Shearman & Sterling, attorneys for the defendant, it is

Adjudged:

I. That the demurrer interposed by the defendant to the second amended complaint herein be, and it hereby is, sustained, and that the said complaint be, and it hereby is, dismissed.

II. That the defendant, The Citizens' Central National Bank of New York, do recover of the plaintiff, R. Ross Appleton, Receiver of the Cooper Exchange Bank, the sum of $47.50, the costs and disbursements of the action.

New York, March 23, 1907.

PETER J. DOOLING, *Clerk.*

15 *Stipulation Waiving Certification.*

It is hereby stipulated, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing are true and correct copies of the notice of appeal and of the judgment roll herein filed in the office of the Clerk of the County of New York, and the certification thereof pursuant to Section 1353 of the Code of Civil Procedure is hereby waived.

Dated New York, April 9th, 1907.

JOHN W. HUTCHINSON, Jr.,
*Attorney for Plaintiff-Appellant.*
SHEARMAN & STERLING, Esqs.,
*Attorneys for Defendant-Respondent.*

*Opinion.*

Supreme Court, Special Term, Part V.

By Mr. Justice O'Gorman.

APPLETON
*v.*
CITIZENS' CENTRAL NAT. BANK.

"Demurrer sustained on authority of the prevailing opinion in this case on the former appeal" (116 App. Div., 404, Adv. Sheets No. 326).

16 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, in the County of New York, on the 24th Day of May, 1907.

Present: Hon. Edward Patterson, presiding justice; George L. Ingraham, Chester B. McLaughlin, John Proctor Clarke, John S. Lambert, justices.

741.

R. Ross APPLETON, Receiver of the Cooper Exchange Bank,
Appellant,
*against*
THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK,
Respondent.

An appeal having been taken to this Court from a judgment of the Supreme Court sustaining a demurrer to the second amended complaint in this action, entered in the office of the Clerk of the County of New York on the 23d day of March, 1907; and the said appeal having been argued by Mr. John W. Hutchinson, Jr., of counsel for the appellant, and by Mr. John A. Garver, of counsel for the respondent, and due deliberation having been had thereon, it is hereby ordered and adjudged, that the judgment so appealed from be, and the same is, hereby affirmed, and that the respondent recover of the appellant the costs of this appeal.

E. P., *J. S. C.*

17 *Judgment of Affirmance.*

Supreme Court, New York County.

R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Plaintiff,
*against*
The Citizens' Central National Bank of New York, Defendant.

The plaintiff having appealed to the Appellate Division of the Supreme Court, First Department, from the final judgment in favor of the defendant, entered in the office of the Clerk of the County of New York on May 23, 1907, sustaining the demurrer interposed by the defendant to the second amended complaint herein, and dismissing the said complaint, with costs; and the said appeal having been duly argued, and the said judgment so appealed from having been affirmed, with costs to the defendant, and the remittitur having been duly filed in the office of the Clerk of the County of New York, and the costs and disbursements of the defendant on this appeal having been taxed at $78.50; now, on motion of Shearman & Sterling, attorneys for the defendant, it is

Adjudged:

18 I. That the said judgment entered herein on March 23, 1907, be, and the same is hereby, affirmed.

II. That the defendant, The Citizens' Central National Bank of New York, to recover of the plaintiff, R. Ross Appleton, Receiver of the Cooper Exchange Bank, the sum of $78.50, the costs and disbursements of this apeal.

New York, June 1, 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

19 *Opinion.*

Supreme Court, Appellate Division, First Department.

May, 1907.

Edward Patterson, P. J.; George L. Ingraham, Chester B. McLaughlin, John Proctor Clarke, John S. Lambert, JJ.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Appellant,
*vs.*
The Citizens' Central National Bank of New York, Respondent.

Judgment affirmed, with costs, on opinion on former appeal; McLaughlin, J., dissenting, on the ground that plaintiff is entitled to recover the amount which Samuels paid to the defendant.

20 *Opinion on Former Appeal.*

Supreme Court, Appellate Division, First Department.

December, 1906.

Edward Patterson, P. J.; George L. Ingraham, Chester B. McLaughlin, John Proctor Clarke, James W. Houghton, JJ.

No. 139.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Respondent.

*vs.*

The Citizens' Central National Bank of New York, Appellant.

Appeal from Judgment Overruling Demurrer to the Complaint.

John A. Garver, for appellant.
Roger B. Wood, for respondent.

Ingraham, *J.:*

The complaint alleges that the Cooper Exchange Bank was a domestic corporation; that by the judgment of the Supreme Court it was duly dissolved and the plaintiff appointed the Receiver thereof; that the defendant was a banking corporation, incorporated under the National Banking Act of the United States; that "on or about
21 the 4th day of January, 1904, the Cooper Exchange Bank, at the instance and request of one Mikael Samuels, trading under the name of Mikael Samuels & Company, and the Central National Bank of the City of New York, did loan and advance unto the said Mikael Samuels the sum of twelve thousand dollars ($12,000)"; that upon the said loan and advance of money said Samuels executed and delivered an instrument, in writing, whereby he acknowledged indebtedness to the said Cooper Exchange Bank of the sum of $12,000, and agreed to return or repay the same on or before four months after date, with interest; and the Central National Bank did then and there in writing promise and agree, on the same day and year, and guarantee unto the said Cooper Exchange Bank, the performance of the obligation before mentioned on the part of the said Samuels; and the said acknowledgment of debt by the said Samuels, and the said guaranty to pay the same by the said Central National Bank (defendant), were, upon the loan of the said sum of $12,000 by the Cooper Exchange Bank, duly delivered and transferred to it, the said Cooper Exchange Bank. Then follows a copy of the guaranty, which is as follows:

"For and in consideration of one dollar and other good and valuable consideration, the Central National Bank of the City of New York hereby guarantees to the Cooper Exchange Bank the payment

at maturity of a loan of twelve thousand dollars, made this day to Mikael Samuels & Co., by the Cooper Exchange Bank.

THE CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK.
By EDWARD LANGDON, *Prest.*"

It was further alleged that the said Samuels had, previous to obtaining the said loan, agreed with the defendant to pay to it the sum of $10,000 of the said sum of $12,000 so obtained,
22 and that the said loan was obtained by the said Samuels, and was guaranteed by the defendant in order that the defendant might obtain the said sum of $10,000, which it did receive, and that $1,000 had been paid on account by Samuels, and that the balance was unpaid.

The defendant demurred, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and seeks to sustain that demurrer upon the claim that this instrument of guaranty was *ultra vires* a national bank under the National Banking Act, having no authority to guarantee the debts of others, even for a valuable consideration.

The Supreme Court of the United States has in a series of cases held that the United States Statutes, relative to national banks, constitute the measure of the authority of such corporations, and that they cannot rightly exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established (California Bank *v.* Kennedy, 167 U. S., 362; Concord First Nat. Bank *v.* Hawkins, 174 U. S., 364). In the first case it was held that "the doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this Court has often recognized and affirmed, upon three distinct grounds. The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law" (165 U. S., 538). It is not claimed that there is any express power given to national banks to guarantee the obligations of others, but it is claimed that such power is to be implied from the provisions of the National Banking Act (R. S. of U. S., p. 999, § 5136), which gives to every bank created under the
23 act power "to exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of indebtedness; by receiving deposits," &c. In the case of People's Bank *vs.* National Bank (101 U. S., 181) the Supreme Court held that where a national bank was the owner of promissory notes of a third party, and procured them to be discounted by another national bank guaranteeing the payment of the notes, the agreement to be liable was not *ultra vires*, but was

within the power granted to national banks by the foregoing provision. The basis of this decision was that the act in handing over to another bank, with an endorsement of guaranty, a negotiable instrument, was one of the modes of transferring the securities named, and that under the circumstances of that case it was competent for the defendant to give the guaranty in question; and in the case of Cochran *vs.* United States (157 U. S., 286) this decision was followed. In that case the note which was guaranteed actually belonged to a national bank, and was transmitted by its president to the cashier of a New York bank by a letter, which said: "We enclose a note of five thousand dollars, signed by Sayre and Clark, guaranteed by us, which please *place to our credit.*" Upon the receipt of this letter the note was discounted by the New York bank for account of the debtor bank and the proceeds paid to the latter institution. These cases, I think, establish these propositions: That a national bank has no power to enter into a general contract of guaranty by which it becomes liable for the debts of others. It has, however, as incident to the negotiating or discounting of negotiable instruments, and other instruments for the payment of money, when it negotiates such instruments by procuring the same to be
24 discounted, the power to guarantee the payment of such instruments. The complaint does not allege that the defendant was the owner of or had any interest in the instrument on which Samuels obtained the loan from the Cooper Exchange Bank; nor did the Cooper Exchange Bank make any loan or advance to the defendant, or purchase from the defendant any negotiable instrument which it had acquired in the usual course of its business. The complaint alleges that the defendant requested the Cooper Exchange Bank to loan Samuels a sum of money, based upon Samuels' obligation to repay that loan of money to the Cooper Exchange Bank, and that when the Cooper Exchange Bank loaned Samuels this sum of money upon his personal obligation to repay the loan to the Cooper Exchange Bank, Samuels delivered to the Cooper Exchange Bank the instrument which was an agreement of the defendant to guarantee "the payment at maturity of a loan of $12,000 made this day to Mikael Samuels & Company by the Cooper Exchange Bank." If the contract of guaranty was *ultra vires* and, therefore, void, no action can be maintained upon it, and as this action is based solely upon the contract of guaranty, no cause of action is alleged. Whether or not the plaintiff would be entitled to recover any sum from the defendant as money had and received, or upon any other theory, it is not necessary to determine; but the mere fact that Samuels paid $10,000 of the money that he had received from the Cooper Exchange Bank to the defendant can upon no principle validate a guaranty for the repayment in full of a loan made to Samuels of $12,000 which was beyond the power of the corporation to make. The amount that Samuels paid or agreed to pay the defendant for its guarantee is not material. It was as much beyond the power of the defendant to guarantee Samuels' debt on payment of $10,000 as on payment of $100—as it was not an incident of its business which it was authorized to con-

duct to guarantee Samuels' debts, nor is it necessary to deter-
25 mine upon this appeal whether the defendant would be liable if it was alleged that the arrangement was one entered into for the purpose of paying the indebtedness of Samuels to the defendant, as there is no allegation that Samuels was indebted to the defendant in any amount, the only allegation being that it was a part of the agreement between Samuels and the defendant that Samuels would pay $10,000 of the loan that he had received from the Cooper Exchange Bank to the defendant.

I think, therefore, that this complaint, based as it is exclusively upon the guaranty by the defendant of the indebtedness of Samuels, was *ultra vires* that no cause of action is alleged.

It follows that the judgment appealed from must be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend the complaint within twenty days on payment of costs in this Court and in the Court below.

Patterson, McLaughlin and Clark, JJ., concur.

Houghton, J., dissents.

26 Supreme Court, Appellate Division, First Department.

December, 1906.

Edward Patterson, George L. Ingraham, Chester B. McLaughlin, John Proctor Clarke, James W. Houghton, JJ.

No. 139.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Respondent,

*vs.*

The Citizens' Central National Bank of New York, Appellant.

Houghton, J. *(dissenting)*:

I agree to the proposition that National Banks cannot engage in the business of guaranteeing obligations of third parties, and that such contracts are *ultra vires*. I think, however, by fair intendment and inference, plaintiff's complaint alleges that the Cooper Exchange Bank loaned twelve thousand dollars to Samuels at the joint request of himself and this defendant for the purpose of enabling him to pay to defendant ten thousand dollars of such amount on an indebtedness owing by him to defendant, which was done as a part of the agreement of guaranty. The ground of demurrer is that the complaint states no cause of action. I think it states facts sufficient to permit a recovery of the ten thousand dollars which the defendant received.

27 If the note had been for only ten thousand dollars, and all of the avails had been paid to the defendant, and defendant had guaranteed the payment of the note, the transaction

would have been wholly completed, and the defendant would not have been permitted to plead that its contract of guaranty was *ultra vires*. After performance and acceptance of benefits a defendant corporation is estopped from interposing the defense that it had no power to make the contract which it benefitted by (Vought *v.* Eastern Building and Loan Association, 172 N. Y., 509; Bowers *v.* Ocean Accident and Guarantee Company, Ltd., 110 App. Div., 695). The fact that the note was for twelve thousand dollars, and that judgment is demanded for that sum, less payments made by Samuels, I do not think changes the situation. The defendant cannot keep the fruits of its act and insist that it had no right to act at all.

The plea of *ultra vires* is ordinarily a defense. If there be instances in which the plea can be invoked to sustain a demurrer, I do not think this is one of them.

The interlocutory judgment should be affirmed.

28 *Notice of Appeal to the Court of Appeals.*

Supreme Court, New York County.

R. Ross Appleton, as Receiver of the Cooper Exchange Bank,
Plaintiff,
*against*
The Citizens' Central National Bank of New York,
Defendant.

Sirs: Please take notice, that the above-named plaintiff hereby appeals to the Court of Appeals of the State of New York from a judgment of the Appellate Division, First Department, in favor of the defendant-respondent and against the plaintiff-appellant, entered in the office of the Clerk of the County of New York on the first day of June, 1907, for the sum of $878.50, the costs on the appeal, and from the order of the Appellate Division, First Department, entered in the office of said Clerk on *on* the 29th day of May, 1907, which said judgment and order affirmed a judgment for $47.50 in favor of the defendant and against the plaintiff, and dismissing the plaintiff's complaint, the said judgment having been entered in the office of the said Clerk on the 23d day of March, 1907, upon a decision of the Court, at Special Term, and the
29 plaintiff hereby appeals from each and every part of said judgment and order.

Dated New York, August 6th, 1907.

Yours, &c., JOHN W. HUTCHINSON, Jr.,
*Attorney for Plaintiff.*

Office and Post Office Address, 37 Wall Street, Borough of Manhattan, City of New York.

To Sherman & Sterling, Esqs., Attorneys for Defendant.
Peter J. Dooling Esq., Clerk of the County of New York.

M. J. D.

30 *Stipulation Waiving Certification.*

It is hereby stipulated, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the order of affirmance, the judgment entered thereon, the notice of appeal therefrom, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof, as required by Section 1315 of the Code of Civil Procedure, is hereby waived.

Dated New York, August 10th, 1907.

JOHN W. HUTCHINSON, JR.,
*Attorney for Plaintiff-Appellant.*
SHEARMAN & STERLING,
*Attorneys for Defendant-Respondent.*

Form 9.

No. 686.

STATE OF NEW YORK, *County of New York, ss.:*

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original Record on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original. Indorsed Filed Mch 9th, 1908.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 16th day of Mch. 1908.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

31 Court of Appeals.

STATE OF NEW YORK, *ss.:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 7th day of January, in the year of our Lord one thousand nine hundred and eight, before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge, presiding. W. H. Shankland, Clerk.

*Remittitur, January 8th*, 1908.

*Amended Remittitur, March* 3, 1908.

R. Ross Appleton, as Receiver of the Cooper Exchange Bank,
Appellant,
*ag'st*
The Citizens Central National Bank of New York,
Respondent.

Be it remembered, That on the 20th day of August, in the year of our Lord one thousand nine hundred and seven R. Ross Appleton, as Receiver, etc., the appellant in this action, came here into the Court of Appeals, by John W. Hutchinson, Jr., his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Citizens Central National Bank of New York, the respondent in said action, afterwards appeared in said Court of Appeals by Shearman & Sterling, its attorneys. Which said notice of Appeal and the
32 return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Julius M. Mayer, of counsel for the appellant, and by Mr. John A. Garver, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division and Special Term of the Supreme Court be and the same hereby are reversed and judgment ordered for the plaintiff on the demurrer, and that the plaintiff recover from the defendant the sum of Ten thousand dollars ($10,000) with interest thereon at the rate of six per cent. per annum from January 4, 1904, together with costs in all the courts.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed, etc. with costs etc. as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Deputy Clerk of the Court of Appeals of the State of New York.*

Amended in accordance with order of Feby. 27th, 1908.
[SEAL.] R. M. BARBER,
*Deputy Clerk.*

3 Court of Appeals, Clerk's Office.

ALBANY, *March* 3, 1908.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER,
*Deputy Clerk.*

M. J. D.

Form 9.

No. 683.

STATE OF NEW YORK, *County of New York, ss:*

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Order on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original. Indorsed Filed Mch. 10th, 1908.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 14th day of Mch. 1908.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

34 At a Special Term of the Supreme Court of the State of New York, held at the County Court House, in the City of New York, on the 9th day of March, 1908.

Present: Hon. James Fitzgerald, Justice.

R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank, Plaintiff-Appellant,

*against*

THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK, Defendant-Respondent.

*Order for Judgment.*

This action having been brought on the remittitur, sent down by the Court of Appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the plaintiff from a judgment of affirmance of the Appellate Division of this Court, affirming a judgment of the Supreme Court entered in the office of the Clerk of the County of New York on the 23d day of March, 1907, dismissing the complaint of the plaintiff herein, with costs, and the said Court of Appeals having reversed the judgment of the Appellate Division of the Supreme Court, and the judgment of the Supreme Court and ordered judgment for the plaintiff for the sum of Ten thousand

($10,000) Dollars, with interest from the 4th day of January, 1904, and costs in all courts;

Now, after reading and filing the remittitur from the said Court of Appeals, and on motion of John W. Hutchinson, Jr., Attorney for the plaintiff, it is hereby

Ordered and adjudged that the judgment of the said Court
35 of Appeals be, and the same hereby is, made the judgment of this Court.

Enter.

J. F., *J. S. C.*

[Seal of New York.]

M. J. D.

A Copy.

PETER J. DOOLING, *Clerk.*

36 [Endorsed:] Supreme Court, New York County. R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Plaintiff, against The Citizens Central National Bank of New York, Defendant. (Copy.) Order for Judgment. John W. Hutchinson, Jr., Attorney for Plaintiff, 37 Wall Street, Borough of Manhattan, New York City.

37 Supreme Court, New York County.

R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Plaintiff,

*against*

The Citizens Central National Bank of New York, Defendant.

*Judgment.*

The plaintiff having appealed to the Court of Appeals of the State of New York, from a judgment in favor of the above named defendant, and against the above named plaintiff entered in the office of the Clerk of the Supreme Court, New York County, on the 1st day of June, 1907, for Seventy-eight Dollars and Fifty cents ($78.50), costs and affirming a judgment entered on the 23rd day of March, 1907, dismissing the complaint in this action, and for Forty-seven Dollars and Fifty cents ($47.50) costs, and said appeal having come on regularly for argument before the said Court of Appeals of the said State of New York, and the said Court of Appeals having ordered and adjudged that the said judgment so appealed from be reversed and judgment ordered for the plaintiff for Ten Thousand ($10,000) Dollars, with interest from January 4th, 1904, amounting to Twenty-five hundred ($2,500) Dollars, with costs in all courts;

Now, on motion of John W. Hutchinson, Jr., Attorney for the plaintiff, it is hereby

Ordered and adjudged that the same judgments so appealed from, be and the same are hereby reversed, with costs to the plaintiff in all

courts, duly taxed at the sum of Three Hundred and Nineteen and 15/100 ($319.15) Dollars; and it is further

Ordered and adjudged that the plaintiff have judgment against the defendant for the sum of Twelve Thousand Eight Hundred and Nineteen and 15/100 ($12,819.15) Dollars, and that the plaintiff have execution therefor.

Judgment signed and entered this 10 day of March, 1908.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

M. J. D.

A Copy.

PETER J. DOOLING, *Clerk.*

Form 9.

No. 696.

STATE OF NEW YORK, *County of New York, ss:*

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original order filed M'ch 9th, 1908 and Judgment filed M'ch 10th 1908 on file in my office, and that the same are correct transcripts therefrom, and of the whole of such originals.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 16th day of M'ch 1908.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

38 [Endorsed:] Supreme Court, New York County. R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Plaintiff, against The Citizens Central National Bank of New York, Defendant. (Copy.) Judgment. John W. Hutchinson, Jr., Attorney for Plaintiff, 37 Wall Street, Borough of Manhattan, New York City.

39 STATE OF NEW YORK, *County of New York, ss:*

On the 26th day of March, in the year 1908, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity

and Deposit Company of Maryland has been duly authorized to transact business in the State of New York in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley and knew him to be the Attorney of said Company; that the signature of the said James R. Kingsley, subscribed to the within instrument, is in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] ERNEST L. HICKS,
*Notary Public, New York County.*

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company in the City of Baltimore, State of Maryland, on the seventh day of February, A. D., 1906, on motion, it was unanimously

"*Resolved*, That Henry B. Platt, Vice-President, or James R. "Kingsley, Attorney, or Frank H. Platt, Edward T. Platt, Joseph A. "Flynn, and Hugh M. Allwood, Attorneys-in-Fact of this Company, "in the State of New York, be, and each of them is, hereby au- "thorized and empowered to execute and deliver any and all bonds "or undertakings for or on behalf of this Company, in its business "of guaranteeing the fidelity of persons holding places of public or "private trust and the performance of contracts other than insurance "policies, and executing or guaranteeing bonds and other undertak- "ings required or permitted in all actions or proceedings or by law "required, and to attach thereto the seal of the Company, the same "to be attested by the said James R. Kingsley, Attorney of the Com- "pany, or by either one of the other persons above named, as occasion "may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney, of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 26th day of March, 1908.

[SEAL.] JAMES R. KINGSLEY, *Attorney.*

## Fidelity and Deposit Company of Maryland.

*Statement December 31st, 1907.*

| Resources. | | Liabilities. | |
|---|---|---|---|
| Real Estate | $757,000 00 | Capital Stock | $2,000,000 00 |
| Stocks and Municipal Bonds | 3,232,740 00 | Surplus | 2,345,978 90 |
| Railroad Bonds | 1,148,150 00 | Premium Reserve | 478,539 17 |
| British Consols | 222,750 00 | Reserve for Taxes on Premiums (payable in 1908) | 35,000 00 |
| Net Premiums Due | 123,102 08 | Reserve for Contingent Claims | 576,748 46 |
| Cash in Bank, etc. | 284,152 50 | Reserve for Claims Adjusted (Checks out) | 31,628 05 |
| | $5,767,894 58 | | $5,767,894 58 |

STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says that he is the Attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31st, 1907, to the best of his knowledge and belief, and that the financial condition of said Company, is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 26th day of March, 1908.

[SEAL.] ERNEST L. HICKS,
*Notary Public, New York County.*

40 Know all Men by these Presents, That we, The Citizens Central National Bank of New York, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, a corporation, as sureties, are held and firmly bound unto R. Ross Appleton, as Receiver of the Cooper Exchange Bank in the full and just sum of Fifteen Thousand ($15000.00) dollars, to be paid to the said R. Ross Appleton, as Receiver of the Cooper Exchange Bank his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of March, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately in the Supreme Court of the State of New York in a suit depending in said Court, between R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Plaintiff, and The Citizens Central National Bank of New York, Defendant a judgment was rendered against The Citizens Central National Bank of New York and the said The Citizens Central National Bank of New York having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said R. Ross Appleton, as Receiver of

the Cooper Exchange Bank citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Citizens Central National Bank of New York shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

WM. V. A. POE as to
THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK. [SEAL.]
By A. K. CHAPMAN, *Cashier*. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND. [SEAL.]
By HUGH M. ALLWOOD, *Attorney in Fact*. [SEAL.]

[SEAL.] Attest: JAMES R. KINGSLEY, *Attorney*.

11 STATE OF NEW YORK, *County of New York:*

On this 26th day of March, 1908, before me personally came Albion K. Chapman, who being by me duly sworn, did depose and say that he resided in the City of Newark, New Jersey; that he is the Cashier of The Citizens Central National Bank of New York, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal and was so affixed by authority of the Board of Directors of the said corporation, and that he signed his name thereto by like authority.

[SEAL.] WILLIAM V. A. POE,
*Notary Public, New York County.*
A. L. M.

[Endorsed:] Appleton *v.* Citizens Central National Bank. The Citizens Central National Bank, and Fidelity and Deposit Company of Maryland, to R. Ross Appleton, as Receiver of the Cooper Exchange Bank. Copy. Bond. Approved Mch. 27, 1908. R. W. Peckham Asso. Jus. Sup. Ct. U. S. A. L. M. M. J. D.

Form 9.

No. 141.

STATE OF NEW YORK, *County of New York, ss:*

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original Bond with Approval endorsed thereon on file in my office, and that the same is a correct

transcript therefrom, and of the whole of such original. Indorsed Filed. Mch. 30, 1908.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 30th day of Mch. 1908.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

42 Supreme Court of the United States.

THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK, Plaintiff in Error,
*against*
R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank, Defendant in Error.

*Petition for Writ of Error.*

Now comes The Citizens Central National Bank of New York by John A. Garver and James M. Beck, its attorneys, and says that on February 27, 1908, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of R. Ross Appleton, as Receiver of the Cooper Exchange Bank, the defendant in error, above named and against The Citizens Central National Bank, of New York, the plaintiff in error above named, and afterwards and on March 10, 1908, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for New York County, said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of the said Supreme Court, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said plaintiff in error, all of which will more in detail appear from the assignment of errors which is hereto annexed, marked "Exhibit A," and is filed with this petition.

The said Court of Appeals of the State of New York is the highest Court of the said State of New York in which a decision in this cause could be had. A printed copy of the record in said Court of Appeals, which contains the opinion of the Appellate Division of the Supreme Court of the State of New York, for the First Department, upon a former appeal in the said action is submitted herewith,
43 marked "Exhibit B," and a copy of the opinion of the said Court of Appeals in the said action is hereto annexed, marked "Exhibit C"; and it appears from both the said opinions that the plaintiff in error specially set up and claimed in both courts an immunity from the liability relied upon in the complaint under the National Bank Act of the United States.

A copy of the said final order and judgment or remittitur of the Court of Appeals is hereto annexed, marked "Exhibit D" and copies of the said final order and judgment of the Supreme Court entered upon the said remittitur are hereto annexed, marked respectively, "Exhibit E" and "Exhibit F."

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and the reversal of the judgment so complained of, that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Supreme Court of the United States, that said writ operate as a supersedeas, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security, all further proceedings in said Court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States.

Dated, March 13, 1908.

JOHN A. GARVER AND
JAMES M. BECK,
*Attorneys for Petitioner.*

44 STATE OF NEW YORK, *County of New York:*

Edwin S. Schenck, being duly sworn, says that he is the President of The Citizens Central National Bank of New York, which is a domestic corporation, and is the petitioner named in the foregoing petition, and that the said petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and, that as to those matters, he believes it to be true.

EDWIN S. SCHENCK.

Sworn to before me, March 14th, 1908.

[Seal William V. A. Poe, Notary Public, New York.]

WILLIAM V. A. POE,
*Notary Public, New York County.*

45 The writ of error as prayed for in the foregoing petition is allowed and the bond is fixed at the sum of $15000 fifteen thousand dollars.

Dated March 24, 1908.

R. W. PECKHAM,
*Associate Justice of the Supreme Court of the United States.*

46 Supreme Court of the United States.

THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK, Plaintiff in Error,
*against*
R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank, Defendant in Error.

*Assignment of Errors.*

Now comes The Citizens Central National Bank of New York, the above named plaintiff in error, by John A. Garver and James M.

Beck, its attorneys, and, in connection with the petition for a writ of error filed herewith, says that in the records and proceedings in this cause and in the final order and judgment, made and entered herein on March 10, 1908, by the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, there is manifest error, in this, to wit:

I. That the said Court erred in deciding that the complaint stated a cause of action in holding that the Central National Bank of New York, a banking association organized under the National Bank Act of the United States, had the power to execute the guaranty referred to in the said second amended complaint and that its successor, the plaintiff in error, was liable on such guaranty.

II. That the said Court erred in deciding that the plaintiff in error is not entitled to immunity, under the said National Bank Act from the claim set up by the defendant in error in the said second amended complaint in this action, based upon the said guaranty.

Wherefore, the said The Citizens Central National Bank of New York, plaintiff in error, prays that the judgment entered in the office of the Clerk of New York County, on March 10, 1908, pursuant to the remittitur of the said Court of Appeals of the
47 State of New York, be reversed, and that judgment be rendered herein in favor of the plaintiff in error, sustaining its demurrer to the said second amended complaint and dismissing the said complaint with costs in all the Courts.

JOHN A. GARVER AND
JAMES M. BECK,
*Attorneys for Plaintiff in Error,*
*Defendant in the Lower Court.*

48 [Endorsed:] Supreme Court of the United States. The Citizens Central National Bank of New York, Plaintiff in error, against R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Defendant in error. Petition for Writ of Error. John A. Garver and James M. Beck, Attorneys for Plaintiff in Error, 44 Wall Street, N. Y.

49 UNITED STATES OF AMERICA

The President of the United States of America to R. Ross Appleton, as Receiver of the Cooper Exchange Bank, and John W. Hutchinson, Jr., Esq., his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York, for the County of New York, in an action wherein The Citizens Central National Bank of New York is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said

writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. W. Peckham Associate Justice of the Supreme Court of the United States of America this 24 day of March, 1908, and of the independence of the United States of America, the one hundred and thirty-second year.

R. W. PECKHAM.
*Justice of the Supreme Court of the United States.*

Attest:
—— ——, *Clerk.*

50 [Endorsed:] Supreme Court of the U. S. The Citizens Central National Bank of New York, Plaintiff in error, against R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Defendant in error. Citation. John A. Garver and James M. Beck, Attorney for Plaintiff in error 14 Wall Street, New York City. Due service of a copy of the within is hereby admitted. New York: Mar. 30 1908. John W. Hutchinson, Jr., Att'y for Def'd't in Error.

51 UNITED STATES OF AMERICA:

The President of the United States of America to The Honorable, the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between R. Ross Appleton, as Receiver of the Cooper Exchange Bank, the plaintiff and defendant in error, and The Citizens Central National Bank of New York, defendant and plaintiff in error, wherein was drawn in question an immunity specially set up or claimed under a statute of the United States and the decision was against the immunity specially so set up or claimed, a manifest error hath happened, to the great damage of said The Citizens Central National Bank of New York, the plaintiff in error, as by its complaint appears:

We being willing that error, if any, hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, by you, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of March, 1908.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by:

R. W. PECKHAM,
*Associate Justice of the Supreme Court of the United States.*

March 24, 1908.

52 [Endorsed:] Supreme Court of the United States. The Citizens Central National Bank of New York, Plaintiff in error, against R. Ross Appleton, as Receiver of the Cooper Exchange Bank, Defendant in error. Writ of Error. John A. Garver and James M. Beck Attorneys for Plaintiff in error. 11 Wall Street, N. Y. Rec'd March 31/1908.

53 STATE OF NEW YORK, *County of New York:*

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served upon me on the thirty first day of March 1908 and in obedience thereto, do hereby certify that the foregoing pages numbered from one to thirty-six, inclusive, contained a true and complete transcript of the record and proceedings had in said Court in the suit mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error the citation to the writ in error with proof of service of the same, the said writ of error served upon me.

In Testimony Whereof, I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the 31st day of Mch 1908.

[New York Seal.] PETER J. DOOLING, *Clerk.*

54 EXHIBIT C.

STATE OF NEW YORK, *Court of Appeals, State Reporter's Office, ss.:*

I, Edwin A. Bedell, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Appleton, Recr. of Cooper Exchge. Bank *v.* Citizens' Central Nat. Bank of New York, decided by the Court of Appeals on the seventh day of January 1908, with the

official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 14th day of March, 1908.

[Seal. Court of Appeals, State of New York.]

EDWIN A. BEDELL,
*As Reporter of the Court of Appeals of the State of New York.*

Attest:
[L. S.] W. H. SHANKLAND,
*Clerk of the Court of Appeals.*

STATE OF NEW YORK, *Court of Appeals:*

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that W. H. Shankland is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Edwin A. Bedell is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Appleton, Recr. of Cooper Exchge. Bank *v.* Citizen's Central Nat. Bank of New York decided by the said Court of Appeals on the seventh day of January 1908, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of W. H. Shankland, as clerk of said court, appended thereto is the true and genuine signature of said W. H. Shankland, and the signature of Edwin A. Bedell, as reporter of said court, appended thereto is the true and genuine signature of said Edwin A. Bedell.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the —— day of March in the year of one thousand, nine hundred and eight.

EDGAR M. CULLEN,
*As Chief Judge of the Court of Appeals of the State of New York.*

55 190 N. Y., 417.

R. Ross Appleton, Receiver of the Cooper Exchange Bank, Appellant,
*v.*
The Citizens' Central National Bank of New York, Respondent.

(Decided January 7, 1908.)

Cullen, *Ch. J.:*

This action is brought by the plaintiff as receiver of a dissolved bank against the defendant, who is the successor of the Central National Bank of the city of New York. The complaint which thus far has been held not to state a good cause of action alleges that on the 4th day of January, 1904, the bank which the plaintiff represents loaned and advanced to one Mikael Samuels the sum of $12,000 on the written agreement of said Samuels to repay said sum on or before four months after date with interest, the repayment of which said loan the Central National Bank guaranteed by the following instrument: "For and in consideration of one dollar and other good and valuable considerations, the Central National Bank of the City of New York hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of twelve thousand dollars, made this day to Mikael Samuels & Co., by the Cooper Exchange Bank;" that at the time of said loan said Samuels was indebted to said Central Bank in the sum of $10,000; that said loan was obtained by said Samuels and guaranteed by said Central Bank for the purpose and upon the agreement that the said Central Bank should receive out of said loan the sum of said $10,000, which Samuels owed to it, which said sum said Central Bank did receive from Samuels; that Samuels failed to pay said loan except the sum of $1,000. Judgment is demanded for the remaining sum of $11,000 and interest. The Appellate Division decided the case by a divided court on the authority of a decision on a previous appeal. The complaint now before us is an amended one and the record does not contain the original complaint, consequently we are not informed as to what difference exists between the allegations of the two pleadings.

The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant bank was *ultra vires* and not binding upon it, and upon this ground the judgments below are sought to be sustained. Had the guaranty been limited to the amount which the bank, under its agreement with Samuels, was to receive out of the loan, we should be entirely clear that it was within the legitimate powers of the bank under the decisions of the Supreme Court of the United States in *People's Bank v. National Bank*
56 (101 U. S. 181) and *Cochrane v. United States* (157 U. S. 286). It was there held that a contract of guaranty of paper held by it was within the implied powers of a national bank,

and this though, as in the later of the cases cited, the note was not made to the guaranteeing bank, but directly to the order of another bank to which the guaranty was made. We think, however, that the defendant's power to guarantee was limited by the extent of its interest in the subject-matter of the guaranty. To allow a bank to guarantee the payment by one of its debtors of a larger sum in order that the bank might receive or retrieve a lesser sum would be to permit it to enter upon very hazardous speculation and authorize very wild and unsafe banking. The learned counsel for the appellant frankly conceded on the argument that a recovery should be limited to the amount received by the defendant. It is insisted, however, that the contract of guaranty must be deemed either good or bad as an entirety, and cannot be upheld in part and rejected in part. I am not willing to concede this claim, but it is unnecessary to discuss it, for its determination is not necessary to the decision of the case. We may assume that the contract was *ultra vires*. We may further assume that in transactions by national banks we should adopt the law of *ultra vires* as it prevails in the Federal courts, and not the local law on the subject. Yet the defendant, in our opinion, became plainly liable for the amount which it received under the *ultra vires* contract. The law which obtains in this state and in several other jurisdictions is that where one party has received the full benefit of an *ultra vires* contract he cannot plead the invalidity of the contract to defeat an action upon it by the other party. (*Bath Gas Light Co. v. Claffy* 151 N. Y. 24). A contrary rule obtains in the Supreme Court of the United States. There it is held that the execution of an *ultra vires* contract by one party cannot confer upon it validity or authorize the other party to sue on its obligations (*Central Transportation Company v. Pullman Palace Car Co.*, 139 U. S. 24), but at the same time it is also held that a party cannot retain money or property received by it under an *ultra vires* contract when it refuses to perform that contract. (*Logan County Bank v. Townsend*, 139 U. S. 67.) It was there said by Judge Harlan: "The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in *Marsh v. Fulton County* (10 Wall. 676, 684), 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'" In a great many cases the difference between the law prevailing in the Federal courts and that of our own would lead to great difference in results. In this case, however, as the plaintiff disclaims
57 any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other. Whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract.

It is urged by the counsel for the respondent that payment by its debtor of the claim it held against him constituted no consideration for the guaranty, for the debtor was bound to perform his obligation. There is no force in this suggestion. The money the defendant received was not that of Samuels, but the plaintiff's and Samuels was merely the conduit through which it was paid to the defendant. It is not a question of consideration between Samuels and the plaintiff, but of consideration between the plaintiff and the defendant. The plaintiff parted with its money solely on the guaranty of the defendant. Whoever heard that the loan of money to the principal was not sufficient consideration for the obligation of the surety? In this case it was the surety who got the money.

Nor is there any force in the suggestion that this action is not brought in disaffirmance of the contract for money had and received but on the contract of guaranty. All the facts are set forth in the complaint, and if these facts entitle the plaintiff to relief on any theory, then the complaint states a good cause of action.

The judgments of the Appellate Division and Special Term should be reversed and judgment rendered for plaintiff on demurrer, with costs in all the courts, with leave, however, to the defendant, within twenty days, to withdraw demurrer and serve answer upon the payment of such costs.

Gray, Haight, Werner, Willard Bartlett and Hiscock, JJ., concur; Edward T. Bartlett, J., taking no part.

Judgment accordingly.

[Endorsed:] Certified Copy. Opinion of Court of Appeals.

Endorsed on cover: File No. 21,090. New York Supreme Court. Term No. 687. The Citizens' Central National Bank of New York, Plaintiff in Error *vs.* R. Ross Appleton, as Receiver of the Cooper Exchange Bank. Filed April 3d, 1908. File No. 21,090.

# Supreme Court of the United States.

OCTOBER TERM, 1908.

CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK,
Plaintiff-in-Error,

*v.*

R. ROSS APPLETON, Receiver of the Cooper Exchange Bank,
Defendant-in Error.

No. [redacted]113

## MOTION TO ADVANCE.

# Supreme Court of the United States.

OCTOBER TERM.

| | |
|---|---|
| CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK, Plaintiff-in-Error, v. R. ROSS APPLETON, Receiver of the Cooper Exchange Bank, Defendant-in-Error. | No. 687. |

And now comes R. Ross Appleton, Receiver of the Cooper Exchange Bank, by Julius M. Mayer and John W. Hutchinson, Jr., his solicitors and counsel, and moves the Court to advance the above-entitled case for hearing at an early date convenient to the Court.

On the 10th day of March, 1908, judgment was entered in the Supreme Court of the State of New York, for the County of New York, in favor of the defendant in-error and against the plaintiff-in-error, for the sum of $12,819.15.

This judgment was entered pursuant to an order of the Court of Appeals of the State of New York, which had overruled a demurrer interposed by the plaintiff-in-error, and directed final judgment to be entered against said plaintiff-in-error.

The action in which this judgment was entered was one brought to recover $10,000 which the defendant in error had received out of the proceeds

of a loan of $12,000 made by the Cooper Exchange Bank to one Samuels, and which loan had been guaranteed by the predecessor of the defendant in error.

After the said loan was made, the said Cooper Exchange Bank became insolvent, and in an action brought by the People of the State of New York, it was dissolved, and R. Ross Appleton was appointed receiver of its assets on November 16, 1905.

After the entry of the said judgment, the plaintiff-in-error obtained a writ of error from this Court to the Supreme Court of the State of New York, on the grounds that a Federal question was involved in the case; that is to say, that the plaintiff-in-error, being a national bank, was without power to make the said guarantee, and that the said guarantee was *ultra vires*

The question claimed to be involved by the plaintiff-in-error is of exceeding public importance, in that it involves the powers of national banks, and a speedy decision of the case is of great importance to all the creditors and depositors of the Cooper Exchange Bank, for the reason that the assets of the said bank collected by the receiver have been insufficient to pay the said creditors and depositors in full, and it will be necessary for the said receiver to commence an action against the stockholders of the said bank, who, under the law of the State of New York, are liable for the deficit up to the amount of their holdings. Said action cannot, however, be commenced until the amount of said deficit is determined, and this cannot be done until the Receiver ascertains whether he can collect the amount of the judgment obtained by him against the plaintiff-in-error. Moreover, the winding up of the said receivership is being delayed by the pendency of this action, and it is a public policy of the State of New York that all such receiverships should be closed as quickly as possible, and for that reason the State of New York has enacted, by Chapter 378 of the Laws of 1883, that all

actions in which a receiver of a banking institution is a party, shall have a preference in all Courts of the State of New York.

Your petitioner, therefore, prays that this Honorable Court will advance said cause and set it down for an early hearing during the October Term, 1908.

JULIUS M. MAYER,
JOHN W. HUTCHINSON, JR.,
Solicitors and Counsel for Petitioner, R. Ross Appleton, Receiver of the Cooper Exchange Bank.

# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 113.

THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK,
*Plaintiff in Error,*

*vs.*

R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

# BRIEF FOR PLAINTIFF IN ERROR.

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# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 113.

THE CITIZENS CENTRAL NATIONAL BANK OF NEW YORK,
*Plaintiff in error,*

vs.

R. ROSS APPLETON, as Receiver of the Cooper Exchange Bank.

Brief for Plaintiff in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

## Statement.

Error to the Supreme Court of the State of New York, for the purpose of obtaining a review of the final judgment entered in that Court under the direction of the Court of Appeals.

The defendant in error, as the Receiver of the Cooper Exchange Bank, sued the plaintiff in error as the successor of the Central National Bank of New York, upon the guaranty of a loan to a third person, executed by the latter Bank.

On January 4, 1904, the Cooper Exchange Bank lent to Mikael Samuels, who was engaged in business under the trade name of Mikael Samuels & Co., $12,-

000, for four months. The loan was made at the request of Samuels and of the Central National Bank (Record, pp. 3-4). At the same time, the latter Bank executed and delivered to the Cooper Exchange Bank the following guaranty:

> "For and in consideration of one dollar and other good and valuable considerations, the Central National Bank of the City of New York hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of Twelve thousand Dollars, made this day *to Mikael Samuels & Co.*, by the Cooper Exchange Bank.
>
> THE CENTRAL NATIONAL BANK OF THE CITY OF NEW YORK,
>
> (SEAL) By EDWIN LANGDON, Pres't."

At and prior to the time when the said loan was made, Samuels was indebted to the Central National Bank for $10,000; and, previous to obtaining the loan, he had agreed with the said Bank to pay to it $10,000 of the said $12,000. This payment was made; and the transaction was entered into with Samuels so that the Central National Bank might obtain the $10,000 (Record, p. 4). It is not claimed, however, that the Cooper Exchange Bank knew anything about this private arrangement between Samuels and the Central National Bank.

Only $1,000 was repaid to the Cooper Exchange Bank on account of the loan; and the Receiver brought the present action, *on the written guaranty*, to recover the remaining $11,000.

A demurrer was interposed to the amended complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action (Record, pp. 5-6). This demurrer was sustained at the Special (trial) Term of the Supreme Court, on the express ground that, under the National Bank Act, the Central National Bank was without power to execute the contract of guaranty sued on (Record, p. 6).

On appeal to the Appellate Division of the Supreme

Court, the judgment was affirmed, on the same ground (Record, pp. 9–13).

On appeal to the Court of Appeals, the judgments of the lower Courts were reversed, and final judgment was directed in favor of the defendant in error (the plaintiff below), *but for only $10,000*, with interest and costs (Record, p. 16). Final judgment was entered accordingly (Record, pp. 18, 19) in the Supreme Court.

## POINTS.

### FIRST.

### Writ properly directed to the Supreme Court.

The Court of Appeals having remitted the record to the Supreme Court of the State of New York, in accordance with the practice which prevails in that State, and the final judgment having been entered by the Supreme Court, which has the custody of the record, the writ of error was properly directed to the latter Court (Record, pp. 16–19).

Atherton v. Fowler, 91 U. S., 143, 146–7;
Wedding v. Meyler, 192 U. S., 573, 581;
Haddock v. Haddock, 201 U. S., 562, 565.

### SECOND.

### This court has jurisdiction.

I. The plaintiff in error (the defendant below) claimed immunity from the guaranty, under the National Bank Act. The final judgment directed by

the Court of Appeals overruled that claim; and the plaintiff in error is consequently entitled to have the question re-examined by this Court.

U. S. Rev. Stat., Sec. 709;
Logan County Bank v. Townsend, 139 U. S., 67, 72-3;
McCormick v. Market Bank, 165 U. S., 538, 546;
California Bank v. Kennedy, 167 U. S., 362, 366;
First Nat. Bank v. Converse, 200 U. S., 425, 439;
Merchants' Nat. Bank v. Wehrmann, 202 U. S., 295, 299;
Yates v. Jones Nat. Bank, 206 U. S., 158;
St. Louis etc. Ry. v. Taylor, 210 U. S., 281, 293.

II. The claim to immunity is sufficiently presented by the record, if it appears that the question was involved in the decision and that the state court could not have directed the judgment without deciding it.

Armstrong v. Treasurer of Athens Co., 16 Peters, 281, 285;
Bridge Proprietors v. Hoboken Co., 1 Wall., 116, 144;
Logan County Bank v. Townsend, 139 U. S., 67, 72-3;
Missouri etc. R. Co. v. Elliott, 184 U. S., 530, 534-5;
Texas etc. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 433-4.

In the present case, the plaintiff in error demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. It thus conceded the correctness of the statement of facts as pleaded, but it contended that no cause of action was shown, because, under the National Bank Act, the guaranty upon which the action was based was *ultra vires* and void. Manifestly, the Court could not have overruled the demurrer without holding that the guarantor Bank did not have any immunity under the National Bank Act.

III. It is immaterial how the federal question is presented in the state court, so long as it appears from the record that it was brought to the attention of the state tribunal.

Murray v. Charleston, 96 U. S., 432, 443;
Spencer v. Merchant, 125 U. S., 345, 352;
Logan County Bank v. Townsend, 139 U. S., 67, 72;
McCormick v. Market Nat. Bank, 165 U. S., 538, 546;
California Bank v. Kennedy, 167 U. S., 362, 365;
Mallett v. North Carolina, 181 U. S., 589, 592;
Missouri etc. Ry. Co. v. Elliott, 184 U. S., 530, 534;
San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S., 177, 179;
German Savings Society v. Dormitzer, 192 U. S., 125, 127;
Leigh v. Green, 193 U. S., 79, 85;
First Nat. Bank v. Converse, 200 U. S., 425, 434;
Merchants' Nat. Bank v. Wehrmann, 202 U. S., 295, 299;
Haire v. Rice, 204 U. S., 291, 299;
Chambers v. Baltimore & Ohio R. R., 207 U. S., 142, 148.

No particular form of pleading is required, and it is not even necessary to raise the question by formally pleading it. It may be raised by the answer, as in California Bank v. Kennedy; or by demurrer to the answer, as in Logan County Bank v. Townsend; or by demurrer to the complaint, as in First National Bank v. Converse; or upon the trial or appeal, although not pleaded at all, as in Murray v. Charleston and Merchants' National Bank v. Wehrman; or upon a motion for a new trial, as in San Jose Land Co. v. San Jose Ranch Co.; or upon a petition for a rehearing, as in Leigh v. Green; and, in any event, it is sufficient to give this Court jurisdiction, if the *opinion* of the state court shows that the question was passed upon, as in German Savings Society v. Dormitzer and Haire v. Rice.

IV. The opinion of the Court of Appeals in the present case expressly shows that the decision of the lower Courts was based upon the ground of *ultra vires* (Record, p. 29):

> "The plaintiff has been defeated on the theory that the execution of the guaranty by the defendant Bank was *ultra vires* and not binding upon it; and *upon this ground*, the judgments below are *sought to be sustained*."

The record shows that, at the special term of the Supreme Court, the demurrer was sustained on the express ground that the guaranty was *ultra vires* and void, under the National Bank Act (Record, p. 6); and the Appellate Division affirmed the judgment on the same ground (Record, pp. 9–13). In reversing these judgments, the Court of Appeals necessarily held that the defendant below was not entitled to the immunity thus claimed by it.

## THIRD.

### Limitations essential to safe banking.

I. The general rule, that corporations have no powers except those expressly conferred by law or incidental to the exercise of their express powers, is peculiarly applicable to banks, and has been enunciated with great emphasis by this Court with reference to National Banks.

> Logan County Bank v. Townsend, 139 U. S., 67;
> California Bank v. Kennedy, 167 U. S., 362, 366.

The reason why the rule applies with especial force to banks is the fact that through them the vast commerce of the country is made possible. Approxi-

mately ninety-five per cent. of all commercial transactions are conducted through the delicate mechanism of credit, represented by bank checks. To insure this remarkable and desirable result, unusual safeguards are thrown about these institutions, not merely for the protection of those dealing with them but also for the benefit of the general public and even of the governments under which they exist. In the statutes under which they are organized, their powers are not merely defined in general terms, as is the case with most corporate statutes, but they are enumerated with explicit detail.

II. What has just been said is particularly applicable to National Banks, which, like the second Bank of the United States, were created for the purpose of aiding the Government in the administration of an important branch of the public service. In addition to their other powers, they act as depositories of the public moneys and may be employed as the financial agents of the general government.

McCulloch v. Maryland, 4 Wheat., 316;
Osborn v. Bank of United States, 9 Wheat., 738;
Farmers' Nat. Bank v. Dearing, 91 U. S., 29;
Davis v. Elmira Savings Bank, 161 U. S., 275, 283;
McClellan v. Chipman, 164 U. S., 347;
Owensboro Nat. Bank v. Owensboro, 173 U. S., 664;
Easton v. Iowa, 188 U. S., 220, 238.

In Davis v. Elmira Savings Bank, the Court said (p. 283):

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows, that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United

States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

It was an important object on the part of Congress to create and maintain confidence in the National Bank system.

McCormick v. Market Bank, 165 U. S., 538, 552.

## FOURTH.

### The powers of National Banks.

The powers conferred upon National Banks are as follows:

"To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

U. S. Rev. Stat., Sec. 5136.

This statute is the sole measure of the powers of banks organized under it.

Bank of U. S. v. Dandridge, 12 Wheat., 64, 68.

## FIFTH.

**The exercise of powers not expressly granted to National Banks is prohibited.**

A National Bank not only cannot exercise any power not expressly conferred by the National Bank Act, or incidental to the exercise of an express power, but the mere failure to grant a particular power constitutes a prohibition against the exercise of such power.

First Nat. Bank v. Nat. Exchange Bank, 92 U. S., 122, 128 ;
California Bank v. Kennedy, 167 U. S., 362, 367 ;
Concord Bank v. Hawkins, 174 U. S., 364.

## SIXTH.

**Unless expressly empowered by statute, corporations have no power to act as accommodation indorsers or guarantors, even for a consideration.**

I. A National Bank has no power to guarantee the payment of the obligations of third persons.

Commercial Nat. Bank v. Pirie, 82 Fed. Rep., 799 (C. C. A.) ;
Bowen v. Needles, etc., Bank, 94 Fed. Rep., 925 (C. C. A.).

Provision is usually made in the general laws of the States for the organization of corporations authorized to execute surety bonds and contracts of guaranty and indemnity ; and, in New York, only corporations thus organized have the power to guarantee.

Nat. Park Bank v. German American Warehousing Co., 116 N. Y., 281, 292.
Fox v. Rural Home Co., 90 Hun, 365 ; affd. 157 N. Y., 684.

II. The most serious consequences would necessarily ensue, if National Banks were permitted to disregard the limitations placed upon their powers and guarantee obligations which they did not own. Such disregard of the statute would permit unlimited speculation and, in the long run, would probably result disastrously and prevent the performance of those duties for which banks are organized and in the performance of which the public is so deeply interested; and, in the end, it would jeopardize the very existence of the National Bank system. This result was distinctly recognized by the Court of Appeals in the case at bar, as it said (Record, p. 30):

> "To allow a bank to guarantee the payment by one of its debtors of a larger sum, in order that the bank might receive or retrieve a lesser sum, would be to permit it to enter upon very hazardous speculation and authorize very wild and unsafe banking."

That is exactly what was done in the present case, as the Central National Bank guaranteed the payment of a note for $12,000, not upon receiving $10,000 of the proceeds *from the lender* but upon the mere promise of the borrower, an irresponsible person who had already defaulted in his obligation to the guarantor, that he would subsequently pay to it $10,000, if it would execute the guaranty.

The complaint in the present case, as originally drawn and as it stood at the time of the first appeal to the Appellate Division, alleged that, in consideration of the execution of the guaranty, Samuels had agreed to pay $10,000 out of the proceeds of the note to the guarantor and that he had made such payment. But, as the Appellate Division properly observed, the amount of the consideration paid for the guaranty is of no consequence (Record, pp. 12-13):

> "It was as much beyond the power of the defendant to guarantee Samuels' debt on payment of

> $10,000, as on payment of $100, as it was not an incident of its business which it was authorized to conduct, to guarantee Samuels' debts."

It could not make the slightest difference whether Samuels promised to pay this $10,000 to the guarantor as a new and independent consideration for the guaranty or whether he promised to pay it on a past due debt. In either case, the guarantor was guaranteeing the debt of a third person merely on the naked promise of that person that he would subsequently pay to the guarantor a sum of money for so doing. The fact that the promise to make this payment was on account of an antecedent indebtedness could not add to the value of the promise. Indeed, the contrary would be true; because, the promise of a debtor, who had already failed to keep his promise, would be less reliable than the promise of a person in good credit. Moreover, a promise to do something which the promisor is already under a legal obligation to do is without consideration.

Carpenter v. Taylor, 164 N. Y., 171.

In Carpenter v. Taylor, the Court said (p. 177):

> "A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract. This principle has frequently been applied by this court, and is recognized as elementary in all of the authorities."

How futile the arrangement was is evident from the fact that within less than a month after the loan was made to Samuels, he was adjudged a bankrupt; and this was known to the Central National Bank (Record, p. 4). His payment of $10,000 to that Bank was, therefore, an unlawful preference, having been made within four months of his failure; and it was the duty of his trustee in bankruptcy to require the return of the money.

Bankruptcy Law, Sec. 60.

It will be presumed that this duty was performed, and, therefore, that the Central National Bank received absolutely no consideration for its guaranty.

III. The only condition under which a bank or other corporation is permitted to guarantee the obligations of third parties is where it owns such obligations and negotiates them to third persons. In such cases, the obligations may have great intrinsic value but be unmarketable without the guaranty of the holder. It is, therefore, a legitimate business transaction to guarantee their payment. In no event can a bank be injured by such guaranty, because, if the obligations prove to be worthless and the bank is required to pay them, it would have the purchase price to apply on account of the guaranty.

Arnot v. Erie Ry. Co., 67 N. Y., 315;
Railroad Co. v. Howard, 7 Wall., 392, 412.

## SEVENTH.

**The contract sued on was ultra vires and void and no action upon it can be maintained.**

The Court of Appeals conceded that the contract of guaranty was *ultra vires* and that no action could be maintained upon it. That is undoubtedly the law in this Court, which holds that an *ultra vires* contract is no contract at all and that no liability can be predicated upon it.

Thomas v. Railroad Co., 101 U. S., 71;
Pennsylvania R. Co. v. St. Louis etc. R. Co., 118 U. S., 290;
Oregon R. Co. v. Oregonian R. Co., 130 U. S., 1;
Pittsburgh etc. R. Co. v. Keokuk Bridge Co., 131 U. S., 371;
Central Transportation Co. v. Pullman Car Co., 139 U. S., 24;

St. Louis etc. R. Co. v. Terre Haute etc. R. Co., 145 U. S., 393;
Union Pacific R. Co. v. Chicago, etc. R. Co., 163 U. S., 564;
McCormick v. Market Bank, 165 U. S., 538;
Railway Company v. Trust Compy., 174 U. S., 553.

In Central Transportation Co. v. Pullman Car Co., the Court said (pp. 59-60):

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it."

In Railway Company v. Trust Company, the Court said (p. 567):

> "A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation and strictly *ultra vires*, unlawful and void, and *incapable of being made good by ratification or estoppel.*"

It makes no difference that the defendant may have received benefit from the contract.

California Bank v. Kennedy, 167 U. S., 362;
Concord Nat. Bank v. Hawkins, 174 U. S., 364;
Merchants' Nat. Bank v. Wehrmann, 202 U. S., 295.

In those cases, National Banks had purchased the capital stock of other banks, upon which they received dividends. The banks whose stocks had thus been purchased failed; and the question was, whether the purchasing banks could be held liable as stockholders for the debts of the insolvent banks. This Court decided that they could not be so held, because they had no authority to purchase the capital stock of other corporations. It was contended that, by receiving the dividends, they were estopped from questioning their ownership and liability. To this, the Court replied (167 U. S., 371):

> "It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that, by a particular act, the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

## EIGHTH.

### Decision below based upon principles of State law wich are contrary to those recognized in this Court.

While the Court of Appeals conceded that the contract of guaranty was *ultra vires* and void and that no action upon it could be maintained, yet it reached the conclusion that the Cooper Exchange Bank was entitled to recover the $10,000 which Samuels paid to the Central National Bank, on the ground that, in the New York State courts, an action may be maintained on an *ultra vires* contract which has been performed, and on the further ground that the money paid to the Central National Bank belonged to the Cooper Exchange Bank and not to Samuels.

That the law of New York in regard to the maintenance of an action on an *ultra vires* contract which has been performed is exactly contrary to that which is recognized in this Court is expressly stated in the opinion of the Court of Appeals in the case at bar (Record, p. 30):

> "The law which obtains in this state and in several other jurisdictions is that where one party has received the full benefit of an *ultra vires* contract, he cannot plead the invalidity of the contract to defeat an action upon it by the other party (*Bath Gas Light Co. v. Claffy*, 151 N. Y., 24). A contrary rule obtains in the Supreme Court of the United States. There, it is held that the execution of an *ultra vires* contract by one party cannot confer upon it validity or authorize the other party to sue on its obligations (*Central Transportation Co. v. Pullman Car Co.*, 139 U. S., 24)."

The National Bank Act provides a complete system for the establishment and government of National Banks.

> Cook County Bank v. U. S., 107 U. S., 445, 448.

In so far, therefore, as the Court of Appeals sought to ignore the decisions of this Court, by applying a doctrine contrary to that which is recognized here, it disregarded the statute. What the Court of Appeals has said in a very recent case (Frank v. Mercantile Nat. Bank, 182 N. Y., 264, 268), with reference to the Bankruptcy Law, is equally applicable to the National Bank Act:

> "As the Bankrupt Law operates through the whole country, the construction to be given to it must necessarily be uniform throughout all the states, not varying with the local law. Therefore, in construing it, we should be governed by the law of set-off as it prevails in the Federal Courts and not in our own."

The same necessity for uniform construction has been recognized by this Court.

Tullock v. Mulvane, 184 U. S., 497, 505;
Yates v. Jones Nat. Bank, 206 U. S., 158.

In Yates v. Jones National Bank, the directors of a National Bank had been declared liable in the state court, in an action of deceit at common law. That was declared to be error by this Court, because the measure of responsibility of directors of National Banks is governed by the provisions of the National Bank Act. On this point, the Court said (p. 178):

> "A contrary conclusion would lead to a varying measure of responsibility in the several states in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one state and a different thing in another. * * * The frustration of the public policy embodied in the national bank system, by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the National Bank Act, might be held liable civilly, not by the standard of conduct which the Act provides for a violation of its express commands, but by another and different one, is apparent."

If that is true as to the details in the management of the business by the directors, it must certainly be true of the more important and fundamental principle which controls the nature and extent of the business which banks formed under the Act may transact. The National Bank Act is the supreme law of the land to National Banks, and a state statute which attempted to authorize the exercise of a power or imposed a liability not permitted by that Act, would be a nullity.

Farmers' Nat. Bank v. Dearing, 91 U. S., 29;
Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 558;
Dobbins v. Los Angeles, 195 U. S., 223, 237.

If a positive statute is void, which conflicts with an Act of Congress, no mere rule or principle of law recognized in the State courts can be applied in disregard of such Act. The States can no more ignore the decisions of this Court in the construction of federal statutes than they can ignore the statutes themselves. The construction becomes an essential part of the statutes.

## NINTH.

### Misapprehension of facts by Court of Appeals.

I. Another ground upon which the Court of Appeals based its decision was that the Central National Bank had received $10,000 of the loan from the Cooper Exchange Bank and that it could not repudiate the contract on which this sum was paid and at the same time withhold the amount from the party paying it. But it is not the fact that the sum of $10,000, or any other sum, was paid by the Cooper Exchange Bank to the Central National Bank, on the contract of guaranty or otherwise.

The case of Logan County Bank v. Townsend (139 U. S., 67) is relied upon as an authority for holding that the Cooper Exchange Bank was entitled to recover the $10,000; but that case is not at all in point, either on the question of practice or on the facts. The Logan County Bank had purchased certain bonds from Townsend, which it agreed to return to him, on demand, at the same price or less. The complaint alleged that the Bank had refused to return the bonds and that at the time of the demand they were worth several thousand dollars more than it had paid for them. Held, that Townsend was entitled to recover,

not on the ground of a breach of the contract but on the ground that the Bank could not repudiate the contract and at the same time retain what it had actually received under it from Townsend.

If, in the present case, the Cooper Exchange Bank had paid directly to the Central National Bank $10,000, for its guaranty of a loan of $12,000 to Mikael Samuels, and if the Central National Bank had subsequently refused to perform the contract, on the ground of *ultra vires*, the Cooper Exchange Bank might, on the authority of the Logan County Bank case, have maintained an action for the recovery of the $10,000 so paid. But the Cooper Exchange Bank did not pay a penny to the Central National Bank. On the contrary, it entered into a separate contract with Samuels, to lend *to him* $12,000; and it made that loan and paid that sum *to Samuels* and not to the Central National Bank; and it relied upon the guaranty, without any knowledge of the separate agreement between Samuels and the guarantor; and it did this, charged with knowledge that the Central National Bank had no power to execute the guaranty.

McCormick v. Market Bank, 165 U. S., 538, 550;
Scott v. Deweese, 181 U. S., 202, 218.

The extent to which the Court of Appeals went in its effort to support its decision is seen in the remarkable assertion (Record, p. 31) that "the money the defendant received was not that of Samuels, but the plaintiff's (the Cooper Exchange Bank)." That assertion is in flat disregard of the actual fact expressly alleged in the complaint (Record, p. 4); for, it is distinctly averred, that when the Cooper Exchange Bank accepted the note of Samuels, it paid the $12,000 *to him* (not to the Central National Bank); and the Cooper Exchange Bank had no concern whatever with what Samuels might do with the proceeds and was not even aware of his promise to pay a portion of the proceeds to the Central National Bank. If some one

had stolen the money from Samuels before he had parted with any of it, he, and not the Cooper Exchange Bank, could alone have maintained an action for its recovery.

The unfounded assertion that the money received by Samuels belonged to the Cooper Exchange Bank and not to him led the Court of Appeals to state that Samuels was a mere conduit for the payment of the money to the defendant. If, as is alleged in the complaint, the loan was made to Samuels, then it inevitably follows that Samuels was not a mere conduit and did not hold the proceeds as the agent of the Cooper Exchange Bank, nor, so far as that Bank was concerned, was he charged with any duty to pay over any part of it to the Central National Bank. The Cooper Exchange Bank did not pay the proceeds to him, with instructions to deliver them or any part of them to the guarantor; for it is not pretended that it knew anything about the arrangement between them. On the other hand, the mere fact that Samuels had previously promised the guarantor (the Central National Bank) to pay to it a portion of the proceeds of the loan, did not make Samuels an agent of the guarantor or confer upon the guarantor title to the proceeds of the loan or a lien of any kind upon the proceeds. The Central National Bank relied solely upon Samuels' naked promise.

II. A further error committed by the Court of Appeals was in holding that the action was not brought on the contract but might be considered as one brought in disaffirmance of the contract. The Appellate Division took a different view of the matter and was of the opinion that the action was based "*solely upon the contract of guaranty*" (Record, p. 12). This view is clearly in accordance with the specific allegations of the complaint and with the demand for judgment, which is for the full amount specified in the contract, that is, $12,000, less $1,000, which had been received on account. The action, therefore, was obviously not brought in dis-

affirmance of the contract, which this Court has held to be the necessary procedure.

Pittsburgh etc. Ry. Co. v. Keokuk etc. Bridge, 131 U. S., 371, 389;
Central Transportation Co. v. Pullman Car Co., 139 U. S., 24, 60.

Indeed, it was impossible to bring an action in disaffirmance of this contract of guaranty, because, if the contract is disregarded, all connection between the two Banks is absolutely severed. The theory of an action brought in disaffirmance of a void contract is that, by treating the contract as a nullity, the party who has received something under it from the other party is, in equity, bound to restore what was thus received without consideration. In the case at bar, if the contract of guaranty is disaffirmed, that is, treated as a nullity, the Cooper Exchange Bank has no claim against the Central National Bank or its successor, for the very simple and conclusive reason that the latter Bank received nothing from the former.

Franklin Company v. Lewiston Sav. Inst., 68 Me., 43, 48-9.

Aside from the question of procedure, the contract was clearly indivisible. The guaranty given was not merely the payment of $10,000, which Samuels had agreed to pay to the Central National Bank, but also the payment of $2,000 additional, which Samuels retained. As to that $2,000, the guaranty was concededly void. It might as well be claimed, in a State where the legal rate of interest is 6% and the acceptance of a higher rate on a loan forfeits the entire amount, that if one person should lend another $12,000, upon a note for that amount, payable to the lender, four months after date, with interest at 6% on $10,000 and at 10% on the remaining $2,000, the payee could recover the $10,000, in an action upon the note for the entire amount, where the defense of usury was pleaded.

## TENTH.

**People's Bank v. National Bank** (101 U. S., 181) **and Cochran v. United States** (157 U. S., 286).

The Court of Appeals was of the opinion that if the guaranty had been limited to the amount which the Central National Bank was to receive from Samuels, the decisions in People's Bank v. National Bank and Cochran v. United States (*supra*) would be conclusive in favor of the right to maintain an action on the guaranty (Record, p. 29).

The Appellate Division viewed those decisions differently (Record, pp. 11–12); and it was right, and the Court of Appeals was wrong, in the effect given to them; because, in each of those cases, the Bank did what the National Bank Act expressly authorizes, namely, it *negotiated* the notes and received the proceeds. It entered into direct and legitimate contract relations with the discounting bank, and personally received the proceeds of the discount *directly from that bank.*

I. It is insisted that People's Bank v. National Bank is on all fours with the present case, because, in that case, Picket, who was indebted to the defendant and delivered the notes to the defendant, made the notes payable directly to the plaintiff (the discounting bank). But that was done pursuant to an agreement with the defendant, by which the defendant received the notes and agreed to "negotiate" them and apply the proceeds to the payment of the indebtedness. The defendant thus not only had the possession of the notes, but they became its actual property. The fact that the notes were nominally payable to the plaintiff made no difference, inasmuch as the maker delivered them to the defendant on account of the amount which he owed it, thus

vesting it with the equitable title; and the defendant *negotiated* them, that is, it procured them to be discounted and itself received the proceeds. Therefore, the defendant was acting strictly within its express powers, which the plaintiff had the right to assume when it paid *to the defendant* (not to the maker of the note) the proceeds of the discount. Had the notes been made payable directly to the defendant, it would have been obliged to indorse them to the plaintiff; and, as this Court said in its opinion in that case (p. 183), a guaranty is a less onerous form of obligation in connection with the negotiation of a note than an indorsement.

The very obvious distinction between that case and the case at bar is in the fact that, there, the notes were actually delivered to the defendant on account of the indebtedness and that the defendant (not the maker) procured those notes to be discounted by the plaintiff and received the proceeds directly from the plaintiff, guaranteeing the payment of the notes in connection with the discount.

In Bank of Genesee v. Patchin Bank (13 N. Y., 309) Judge DENIO, writing for the Court, said (pp. 314-15):

> "The officers of a banking association * * * have no power to engage the institution as the surety for another in a business in which it has no interest. * * * I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount or for any other lawful purpose. In this respect, it has the same right as any other holder of such paper."

In Commercial Nat. Bank v. Pirie (82 Fed. Rep., 799), which expressly holds that a National Bank has no power to guarantee the payment of another's obligation, the above distinction was recognized, the Circuit Court of Appeals saying (p. 801):

> "The Act of Congress under which the Bank was organized confers no authority upon national

> banks to guarantee the payment of debts contracted by third parties; and acts of that nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily *ultra vires*. A national bank may indorse or guarantee the payment of commercial paper which it holds, when it re-discounts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incident to the express authority conferred on such banks by the National Banking Act, to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt."

In Bowen v. Needles Nat. Bank (94 Fed., 925), also decided by the United States Circuit Court of Appeals, the Court recognized the same principle (p. 928):

> "There is in these provisions (of the National Bank Act) no grant or power to guarantee the debt of another, nor can such guaranty be said to be incidental to the business of banking * * *. An apparent exception is recognized in the case of the discount of promissory notes by national banks, which may be transferred with a guaranty; but it rests upon the ground that the guaranty of such paper is but an ordinary incident to its transfer in the course of banking."

II. In Cochran v. United States, the facts were even more obvious than in People's Bank v. National Bank, as the notes in that case were not only delivered to the defendant Bank but were made payable to it, and the guaranty was merely an indorsement of them in transmitting them for discount and receiving the proceeds directly from the discounting bank.

III. In each of the said cases, the Bank acted strictly within its express powers, in *negotiating* commercial paper which had been delivered to it for the very purpose of being negotiated, and in receiving the proceeds directly from the discounting bank.

## ELEVENTH.

### The method actually employed cannot be disregarded.

If Samuels had given a note to the Central National Bank for $12,000, on the understanding that the Bank should have the right to discount it at the Cooper Exchange Bank and pay Samuels $2,000 of the proceeds, applying the remainder to his indebtedness, and if the Central National Bank had then indorsed the note to the Cooper Exchange Bank and received the proceeds, counsel for the defendant in error contends that the transaction would have been valid; and he argues that this was the effect of the method actually adopted. But there is this marked distinction between the two methods. The Central National Bank could not have questioned the validity of the assumed transaction, because it would have been acting strictly within its statutory powers in negotiating the paper; and the Cooper Exchange Bank would also have been acting within its powers in discounting the note for the Central National Bank, upon the lawful obligation of that Bank, made in the ordinary course of business. Moreover, the Central National Bank would have received the $12,000 from the Cooper Exchange Bank and not from Samuels; and this sum could, in any event, have been recovered in an action brought in disaffirmance of the contract.

A void and unlawful transaction is not rendered valid merely because the result might have been attained in a lawful manner. Where, for instance, a loan is made which is usurious, the lender cannot avoid the usury by showing that the transaction might have been entered into in a manner that would have been lawful.

## TWELFTH.

**The judgment should be reversed, with costs.**

Washington, January, 1910.

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JOHN A. GARVER,
Of Counsel.

# Supreme Court of the United States,

October Term, 1909.

No. 113.

THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK,
Plaintiff-in-Error,

*vs.*

R. ROSS APPLETON, AS RECEIVER OF THE COOPER EXCHANGE BANK,
Defendant-in-Error.

In Error to the Supreme Court of the State of New York.

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# Supreme Court of the United States.

OCTOBER, 1909. No. 113.

THE CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK,

Plaintiff-in-Error,

*v.*

R. ROSS APPLETON, Receiver of the Cooper Exchange Bank,

Defendant-in-Error.

Brief for Defendant-in-Error.

## Error to the Supreme Court of the State of New York.

### Statement.

The defendant-in-error, as receiver of the Cooper Exchange Bank sued, in the Supreme Court of the State of New York, plaintiff-in-error as the successor of the Central National Bank of New York upon the following facts:

On and prior to January 4, 1904, one Michael Samuels owed the Central National Bank of the City of New York, which was the predecessor of the plaintiff-in-error, the sum of ten thousand dollars (Record, p. 4). Samuels and the said Central National Bank entered into an agreement that the Central National Bank should receive this amount of ten thousand dollars out of a loan of twelve

thousand dollars to be obtained from the Cooper Exchange Bank, of which the defendant-in-error was subsequently appointed receiver (Record, p. 4). For this purpose the said Samuels and the Central National Bank requested the Cooper Exchange Bank to loan to the said Samuels the sum of twelve thousand dollars, for which loan Samuels gave his promissory note, payable four months after date, and the Central National Bank gave its written guarantee of payment of the said note (Record, p. 4). Out of the said sum of twelve thousand dollars of the funds of the Cooper Exchange Bank the Central National Bank received the ten thousand dollars which had been agreed between itself and Samuels it should receive. No part of the said sum of twelve thousand dollars was paid to the Cooper Exchange Bank, or to its receiver, except the sum of one thousand dollars, and judgment was prayed for in the complaint for the balance of eleven thousand dollars, with interest.

The plaintiff-in-error demurred to this complaint, upon the ground that the complaint did not state facts to constitute a cause of action (Record, pp. 5, 6), which demurrer was sustained in the court of first instance and final judgment was entered against the plaintiff in that case, the defendant-in-error herein. This judgment was sustained by the Appellate Division of the Supreme Court, but was reversed in the Court of Appeals, where, upon the argument, the plaintiff limited his demand to the recovery of the $10,000 (out of the said $12,000), which had been obtained and received by the predecessor of the plaintiff-in-error, the Central National Bank (Record, p. 30).

## Point I.

### The determination of the State Court as to the form of the cause of action set forth in the complaint, is binding on this Court.

In the opinion of Chief Judge Cullen (Record, p. 31), he says:

> "All the facts are set forth in the complaint, and if these facts entitle the plaintiff to relief on any theory, then the complaint states a good cause of action."

Amplifying this statement, which is in effect a construction by the State Court of the form of action which it had before it under the State law, we call attention to the following provisions of the New York Code of Civil Procedure:

> "Sec. 481. The complaint must contain * * * (2) A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition;" and

Section 519 of the Code of Civil Procedure:

> "The allegations of a pleading must be liberally construed with a view to substantial justice between the parties."

The decision of the Court of Appeals of the State of New York that the complaint in this action stated facts sufficient to permit of the examination and determination of the point on which its decision turned is a decision by the Court of highest resort in the State of New York on a question of practice which is never reviewed by this Court.

*Grand Rapids & Indiana R. R.* v. *Butler*, 159 U. S., 57, at page 91, where the Court by Mr. Chief Justice Fuller delivering the opinion, said:

> "The State Court held, however, the pleading sufficient to permit of the examination and determination of the point on which its decision turned, and that conclusion involved no Federal questions."

As construed by the Court of Appeals of the State of New York, therefore, the complaint in this action states a good cause of action for the recovery of the $10,000 paid out by the Cooper Exchange Bank and received by the Central National Bank, the predecessor of the plaintiff-in-error in discharge of the debt of Samuels to it.

Under the decision of the State Court, this recovery is not placed on any particular ground. The complaint was challenged only by a general demurrer; and if, on the theory of breach of guaranty, on the theory that the plaintiff might recover for money had and received, or on any theory known to law or equity the facts stated permitted a recovery, then the general demurrer was properly overruled.

## Point II.

### The defendant-in-error is entitled to recover the $10,000 which it gave up on the faith of the guaranty and which was received by the guarantor.

When this complaint is interpreted as the law of New York requires it to be it avers in substance that the Central National Bank and Samuels acting in concert obtained $2,000 for Samuels' benefit and $10,000 for the benefit of the Central National Bank from the Cooper Exchange Bank for and in consideration of a guaranty then given by the Central National Bank. Let us now assume that this guaranty is wholly valueless, and that therefore the consideration on which the money was paid over by the Cooper Exchange Bank wholly failed. This reasoning brings us directly to a situation where an action for money had and received is exactly appropriate (27 *Cyc.* 858, Seq.).

The right to sue for money had and received has frequently been said to be to a certain extent an equitable action.

" Whenever one person has in his hands money, equitably belonging to another, that other person may recover by assumpsit for money had and received."

*Gaines* v. *Miller*, 111 U. S., 395, 397.

While it is conceded that under the decisions of this Court a party cannot recover upon an *ultra vires* contract it has never been held in this Court or in any other jurisdiction that a party can retain what it has received under such a contract, and refuse to perform the contract on the ground that it

is *ultra vires*. In considering this question it must be borne in mind that the giving of the guaranty was but one step in this entire arrangement between these three parties, Central National Bank, Samuels and the Cooper Exchange Bank. As stated in the complaint, Samuels was indebted to teh Central Bank in the sum of $10,000. The Central National Bank and Samuels requested the Cooper Exchange Bank to loan to Samuels the $12,000 upon the note of Samuels on the guaranty of the Central National Bank in order that the said Central National Bank might obtain out of the $12,000 of the money belonging to the Cooper Exchange Bank $10,000, and which $10,000 it did receive. The fact that the entire $12,000 was loaned to Samuels and $10,000 of it was paid by him to the Central National Bank does not alter the fact that the Central National Bank received $10,000 of money which had belonged to the Cooper Exchange Bank and which it received solely and only by reason of the fact that it gave its guaranty to the Cooper Exchange Bank for the payment of the $12,000.

It is contended by the plaintiff-in-error that the Cooper Exchange Bank was not *privy* to the arrangement between Samuels and the Central National Bank, pursuant to which Samuels turned over to the Central National Bank $10,000 of the $12,000 received by him from the Cooper Exchange Bank. Whether the entire arrangement constituted the Cooper Exchange Bank privy to this arrangement between Samuels and the Central National Bank or not, the Central National Bank did, as a matter of fact, receive as a result and solely as a result of the guaranty which it gave (and which it now claims to be *ultra vires* and unenforceable) $10,000 of the money of the Cooper Exchange Bank, and which it should not, by any plea of the invalidity of its own action, be allowed to retain.

While we recognize the force of the broad argument to be found on page 10 of the brief of the plaintiff-in error, to the effect that National Banks should be strictly limited to the exercise of their proper powers and the serious results which would follow upon the disregard by them of the statutes, we cannot see its pertinency to the facts in this case. We cannot see how the requirement by the Courts that the Central Bank should return to the Receiver of the Cooper Exchange Bank the $10,000 which it received of the money of the Cooper Exchange Bank upon the faith of its written guaranty, claimed to be *ultra vires*, can in any way be said to be contrary to the most enlightened public policy. We are of the opinion, while public policy may require that National Banks should not enter into transactions beyond their corporate power, that when they have received the proceeds of such a transaction, they should not and cannot be allowed in common honesty to retain such proceeds, while pleading their corporate incapacity to enter into the transaction as a defense to the liability imposed by its terms.

It must be remembered in this connection that the case at bar is completely distinguishable from that class of cases where the transaction is inherently void as against public policy, because the act complained of is *malum in se*, or of a character prohibited obviously to safeguard public morals. Such, for instance, would be a gambling transaction or a lobbying contract.

Except in such instances, the Courts have not allowed the benefits of a transaction to be retained on the plea of *ultra vires*.

In *Logan County National Bank* v. *Townsend*, 139 U. S., 67, a national bank purchased some bonds of a Municipal corporation under an agreement that the bank would upon demand return the

bonds to the plaintiff at the price paid or less. The bonds advanced in price and upon the demand of the plaintiff for the return of them at the agreed price, the bank refused and upon being sued for the difference between the value of the bonds at the agreed price and their then market value, the Bank pleaded that it had no power to enter into the transaction and it therefore could not be enforced. The Court said, p. 74:

> "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the Act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. * * *"
>
> "The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the National Banking Act. 'The obligation to do justice,' this Court said in *Marsh* v. *Fulton County*, 10 Wall., 676, 684, 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'"

In *Aldrich* v. *Chemical National Bank*, 176 U. S., 618, the Vice-President of the Fidelity National Bank of Cincinnati borrowed from the Chemical National Bank of the City of New York, $300,000.

which the Chemical National Bank credited the Fidelity Bank on its books, and which was exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. In a suit brought by the Chemical National Bank against the Receiver of the Fidelity Bank, the Court held, at page 636:

> "If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank, by its check upon the Chemical Bank, had drawn the whole $300,000 at one time, and now had the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the Act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit

> money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the Acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

But the argument on this point cannot be better stated than in the language of the distinguished Chief Judge of the Court of Appeals of the State of New York, in rendering the unanimous opinion of that Court in this case. He says:

> "We may assume that the contract was *ultra vires*. We may further assume that in transactions by national banks we should adopt the law of *ultra vires* as it prevails in the Federal Courts, and not the local law on the subject. Yet, the defendant, in our opinion, became plainly liable for the amount which it received under the *ultra vires* contract. The law which obtains in this state and in several other jurisdictions is that where one party has received the full benefit of an *ultra vires* contract he cannot plead the invalidity of the contract to defeat an action upon it by the other party (*Bath Gas Light Co* v. *Claffy*, 151 N. Y., 24). A contrary rule obtains in the Supreme Court of the United States. There it is held that the execution of an *ultra vires* contract by one party cannot confer upon it validity or authorize the other party to sue on its obligations (*Central Transportation Company* v. *Pullman Palace Car Co.*, 139 U. S., 24), but at

the same time it is also held that a party cannot retain money or property received by it under an *ultra vires* contract when it refuses to perform that contract (*Logan County Bank* v. *Townsend*, 139 U. S., 67). * * * In a great many cases the difference between the law prevailing in the Federal Courts and that of our own would lead to great difference in results. *In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other.* Whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract." (Italics ours).

See also:

*Merchants' Bank* v. *State Bank*, 10 Wall., 604, 644.

*United States* v. *State Bank*, 96 U. S., 30, 36.

*Louisiana* v. *Wood*, 102 U. S., 294.

*Pullman's Car Company* v. *Transportation Co.*, 171 U. S., 138, 151.

## Point III.

**The transaction between the Central National Bank and the Cooper Exchange Bank was not such a contract of guaranty as is forbidden to be made by national banks, but was a written promise made to a third party for the purpose of collecting an existing debt and is therefore an enforceable obligation.**

To avoid confusion, certain fundamental propositions may be agreed to at the outset.

The United States statutes relative to national banks constitute the measure of authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. It is also true that the National Banking Act (U. S. R. S., Sec. 5136) does not confer any express powers upon national banks to guarantee obligations of others.

The lack of power, however, to guarantee the payment of obligations, which is thus prohibited (because not expressly conferred), refers to the business of guarantying debts, or to a transaction the very purpose of which is to guarantee for profit as a commercial risk the payment of another's obligation.

Such a business is obviously hazardous and of a character which Congress deemed unwise to permit.

Examples of such prohibited contracts are found in the cases of *Commercial National Bank* v. *Pirie*, 82 Fed. Rep., 799; and *Bowen* v. *Needles Nat. Bank*, 94 Fed. Rep., 925.

In the former case the bank guaranteed the payment of bills of goods, although there was no relation of debtor and creditor between the bank and the person for whom the bills were guaranteed.

In the latter case the bank guaranteed payment of the checks of a third party who had on deposit no funds with the bank, and apparently had no relations with it to justify such conduct.

In both these cases, and doubtless many others, the guaranty was a mere venture for a consideration; it represented an effort to engage in the business of guaranty contrary to the powers conferred upon it. But such is not the case at bar.

This brings us to a consideration of the true construction to be given to the provisions of Section 5136 of the Revised Statutes of the United States, defining the powers of directors and officers of a national bank.

In Paragraph VII of said section the power conferred is expressed in the following language:

> "The exercise by its board of directors, or duly authorized officers or agents, subject to law, of such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt. * * *"

The intention of Congress in thus framing the language defining the powers of national banks was not to qualify the first portion of the section by a limitation that the only transactions which could be engaged in were the discounting and negotiating of promissory notes, etc.; but, of necessity, Congress conferred upon a national bank such incidental powers as *"shall be necessary to carry on the business of banking;"* realizing that it was impossible to foresee every contingency or transaction

which might occur and which would be legitimately incidental and necessary to carrying on the business.

Certainly, it is the duty of a national bank to collect the debts owing to it, and, in that connection, it has frequently become necessary for a national bank to engage in transactions or to accept payment or security in a manner and of a character not permissible as an original or initial transaction. This is the principle upon which some notable cases have been decided.

In *American National Bank* v. *National Wall Paper Co.*, 77 Fed. Rep., 85 (U. S. Circuit Court of Appeals), the head-note is as follows:

> "A national bank purchased the stock of a dealer in wall paper at a sale under an execution in its favor, and afterwards organized a corporation to take and dispose of this stock, such corporation being managed by the officers and controlled by it. In order to dispose of the stock to advantage, new stock was purchased on credit, the bank, through its cashier, informing the seller, upon inquiry, of the relation between the bank and the corporation, and that the bank would see that the bills were paid if the goods were sold."

The Court said, at page 93:

> "It is next said that the bank had no authority under its charter to buy and sell goods, and that any purchase of goods by the bank, or any one for it, was *ultra vires*, and did not bind the bank. We entertain no doubt of the bank's right to purchase the A. Gauthier stock at the sale thereof on the judgment in its favor; and the right to purchase to save a pre-existing debt due the

> bank carried with it by necessary implication the right to sell the goods so purchased. How the bank should proceed to dispose of the goods purchased at the attachment sale, and whether, in order to sell that stock to the best advantage, it could rightly buy fresh goods to mingle with it, we need not inquire, for conceding that it had no right to purchase any goods, not even those purchased at the attachment sale, its liability to pay for the goods purchased from the plaintiff is not affected on the facts on this case."

On the same principle are:

> *Morris* v. *Third National Bank of Springfield*, 142 Fed. Rep., 25.
> *National Bank* v. *Case*, 99 U. S., 628.
> *First National Bank* v. *National Exchange Bank*, 92 U. S., 122.
> *Cockrill* v. *Abeles*, 86 Fed. Rep., 505.
> *Central R. R. and Banking Co. of Georgia* v. *Farmers' Loan and Trust Company*, 114 Fed. Rep., 263.

The law is stated in the *Morris* case, *supra*, at page 31, as follows:

> "A national bank may lawfully do many things in securing and collecting its loans, in the enforcement of its rights and the conservation of its property previously acquired, which it is not authorized to engage in as a primary business."

After referring at some length to the various cases upholding this proposition, the Court, in the same case continues:

> "Such cases are sufficient to illustrate the latitude that is permitted national banks,

> not in the character of the acts they may primarily engage in as a business, but in the management and protection of property and rights acquired in the usual course of banking transactions and it includes such minor incidental powers as may be necessary adapted to the ends in view."

The limitation upon the powers of national banks was imposed by Congress in line with a sound public policy, and for the purpose of confining national banks to the transations having to do with the banking business, as distinguished from other businesses in which other individuals and corporations may engage; but it would be in direct contravention of public policy to declare as void transactions entered upon solely for the purpose of collecting a debt, as distinguished from transactions entered upon as a primary enterprise.

In brief, then, our position is that the national bank had authority, as incidental power necessary to properly carry on its business of banking to take such means as it could to collect the debt against Samuels, and in consideration of the payment of that debt to undertake the contingent liability of a guaranty to the party advancing the money, to wit, the Cooper Bank. And when we speak of guaranty in this connection we do not mean the business of guaranty for profit as a commercial hazard, but we mean the contingent promise to pay, made for the purpose of collecting a debt.

By limiting the recovery in accordance with the principle laid down by the Court of Appeals of the State of New York to the amount which the bank executing the guaranty or promise to pay actually received, a rule of law is established which is sound, not only as a legal proposition but also as matter of public policy.

Under such a rule all of the parties will at all times be where they originally were. Samuels owed the Central National Bank $10,000. The Central National Bank obtained that $10,000 from the Cooper Exchange Bank upon its promise to make good in the event that Samuels did not. Samuels did not make good whereupon the Cooper Exchange Bank gets back its $10,000 and the Central National Bank is no better or worse off than before the transaction occurred.

## Point IV.

### The case of Peoples' Bank v. National Bank, 101 U. S., 181, and Cochran v. United States, 157 U. S., 286, are decisive upon the question at bar.

We need not, however, rely solely upon the proposition that the Central Bank acted within the incidental powers conferred by Congress. The two cases above referred to, and more especially the Peoples' Bank case, are so analogous in principle with the case at bar, that we may rest our position upon their authority.

In the *People's Bank* v. *National Bank*, one Pickett made his ten promissory notes *payable to the order of the People's Bank of Belleville* for $5,000 each and delivered them to the Manufacturers' National Bank of Chicago to be given to the People's Bank pursuant to a prior agreement between him and the Manufacturers' National Bank that they would give them to the People's Bank and apply the proceeds to a prior indebtedness of Pickett to the Manufacturers' Na-

tional Bank. The Manufacturers' National Bank did give the notes to the People's Bank, at the same time guaranteeing the payment of the said notes by endorsing a written guaranty on the back of the notes, and also by delivering a separate instrument to that effect. They received the proceeds of the notes in the shape of a credit and applied them to the cancellation of Pickett's indebtedness.

It will be noted that the title to these notes was never in the Manufacturers' National Bank; that it was not an endorser; that the notes were made by Pickett payable directly to the People's Bank, and that, in obtaining the proceeds upon them from the People's Bank, the Manufacturers' Bank merely acted as an agent of Pickett. Under this state of facts the United States Supreme Court held (page 183):

> "Undoubtedly a bank might endorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created under such an endorsement. We see no reason to doubt that under the circumstances of this case it was competent for the defendant to give the guaranty here in question. * * * The doctrine of *ultra vires* has no application in cases like this. * * * A different result would be a reproach to our jurisprudence."

It will be noted in the People's Bank case, as in the case at bar, a third party was indebted to the bank which gave the guaranty; in both cases an arrangement was entered into under which money was to be obtained upon the application of the third party, payable to the order of another bank. In both cases it had been agreed that the indebtedness

of the third party to the bank making the guaranty should be paid out of the proceeds so realized; in both cases this was done.

The doctrine of the People's Bank case, as we read it, is that if a national bank at its own instance obtains money from another source by guaranteeing the payment of the note of its debtor and receiving its proceeds, and the transaction is thus in realty for the collection or extinguishment of a debt, as distinguished from the commercial hazard of guaranty, then that such a guaranty is within the powers of the bank, for the obvious reason that it is a less onerous obligation than would be an endorsement which is concedely not *ultra vires*.

In *Cochran* v. *The United States* (*supra*), Cochrane and Sayre had been indicted under the Revised Statutes of the United States for failure to report all of the liabilities of the First National Bank of Del Nort, Colorado, in "that the said Association was then and there indebted and liable to the Hanover National Bank of New York City in the sum of $5,000, evidenced by a certain promissory note executed by said Robert H. Sayre and one A. H. Clark, and *payment thereof guaranteed* by said Association to said Hanover National Bank of New York City as he the said Robert H. Sayres, then and there well known" (*Cochran* case, page 295).

There was nothing in the indictment to show else than a naked guaranty; there was no such strong position as in the case at bar, where the promise or guaranty was based upon the relation of debtor and creditor. The indictment in this regard merely charged a failure to report as a liability a naked guaranty of a third party's note. So far as we are here concerned, the case necessarily turned upon the question as to whether this naked

guaranty was a liability; for if it was, then it was the duty of Sayre to report it. The Court, in sustaining the sufficiency of the indictment, says, among other things, and without any reservation or exception as to whether the bank owned a note or not (page 297): "We have held that a contract of guaranty is within the implied powers of a national bank" (*People's Bank* v. *National Bank*, 101, U. S. 181).

The learned Justice writing for the Appellate Division (Record p. 12) construed the *Cochran* case as being based upon the proposition that the note actually belonged to the bank, and he evidently thought that the Supreme Court of the United States had rested its decision upon the fact that the note did belong to the bank.

An examination of the *Cochran* case will show, however, that the United States Supreme Court, in saying, "And in this case there seems to have been good grounds for belief that the note actually belonged to the bank," etc., was merely *obiter;* for the holding by the Court that the indictment was sufficient was clearly based upon the proposition that the mere guaranty constituted the liability for failure to report which the officer was indicted.

## Point V.

**No error was committed by the Court of Appeals of the State of New York, and the judgment entered upon its decision should be affirmed.**

It must be borne in mind that the judgment entered in this case results from the overruling of a general demurrer to the complaint, and is based upon the proposition that the complaint states a good cause of action. The plaintiff-in-error did not avail itself of the right to answer over granted it by the Court of Appeals, and final judgment was therefore entered against it. If, therefore, the complaint in this case states a cause of action on any theory, legal or equitable, and for the recovery of any amount, no error was committed in overruling the general demurrer interposed.

Dated New York, January, 1910.

JOHN W. HUTCHINSON, JR.,
Attorney for Defendant-in Error.

JULIUS M. MAYER,
JOHN W. HUTCHINSON, JR.,
H. SNOWDEN MARSHALL,
Of Counsel.

# CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK *v.* APPLETON, RECEIVER OF THE COOPER EXCHANGE BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 113. Argued January 27, 28, 1910.—Decided February 21, 1910.

Although a contract made by a corporation may be illegal as *ultra vires*, an implied contract may exist compelling it to account for the benefits actually received.

A national bank which guarantees a loan made by another bank in pursuance of an agreement that it be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability for the amount actually received by it pursuant to the arrangement on the ground simply of *ultra vires;* it may be liable for money had and received.

190 N. Y. 417, affirmed.

THE facts are stated in the opinion.

*Mr. John A. Garver*, with whom *Mr. James M. Beck* was on the brief, for plaintiff in error:

The rule, that corporations have no powers except those expressly conferred by law or incidental to the exercise of their express powers, is peculiarly applicable to banks. *Logan County Bank* v. *Townsend*, 139 U. S. 67; *California Bank* v. *Kennedy*, 167 U. S. 362, 366.

Unusual safeguards are thrown about these institutions, not merely for the protection of those dealing with them but also for the benefit of the general public and even of the governments under which they exist. In the statutes under which they are organized, their powers are not merely defined in general terms, as is the case with most corporate statutes, but they are enumerated with explicit detail. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *McClellan* v. *Chip-*

*man*, 164 U. S. 347; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664; *Easton* v. *Iowa*, 188 U. S. 220, 238.

It was an important object on the part of Congress to create and maintain confidence in the national bank system. *McCormick* v. *Market Bank*, 165 U. S. 538, 552.

Powers are conferred upon national banks by Rev. Stat., § 5136, and this statute is the sole measure of those powers. *Bank of United States* v. *Dandridge*, 12 Wheat. 64, 68.

The exercise of powers not expressly granted to national banks is prohibited. *First Nat. Bank* v. *Nat. Exchange Bank*, 92 U. S. 122, 128; *California Bank* v. *Kennedy*, 167 U. S. 362, 367; *Concord Bank* v. *Hawkins*, 174 U. S. 364.

Unless expressly empowered by statute, corporations have no power to act as accommodation indorsers or guarantors, even for a consideration. *Commercial Nat. Bank* v. *Pirie*, 82 Fed. Rep. 799, *Bowen* v. *Needles &c. Bank*, 94 Fed. Rep. 925.

Provision is usually made in the general laws of the States for the organization of corporations authorized to execute surety bonds and contracts of guaranty and indemnity; and, in New York, only corporations thus organized have the power to guarantee. *Nat. Park Bank* v. *German-American Warehousing Co.*, 116 N. Y. 281, 292; *Fox* v. *Rural Home Co.*, 90 Hun, 365; aff'd 157 N. Y. 684.

The Court of Appeals conceded that the contract of guaranty was *ultra vires* and that no action could be maintained upon it. That is undoubtedly the law in this court, which holds that an *ultra vires* contract is no contract at all and that no liability can be predicated upon it. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co.* v. *St. Louis &c. R. Co.*, 118 U. S. 290; *Oregon R. Co.* v. *Oregonian R. Co.*, 130 U. S. 1; *Pittsburgh &c. R. Co.* v. *Keokuk Bridge Co.*, 131 U. S. 371; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24; *St. Louis &c. R. Co.* v. *Terre Haute &c. R. Co.*, 145 U. S. 393; *Union Pacific R. Co.* v. *Chicago &c. R. Co.*, 163 U. S. 564; *McCormick* v. *Market Bank*, 165 U. S. 538; *Railway Company* v. *Trust Company*, 174 U. S. 553.

It makes no difference that the defendant may have received benefit from the contract. *California Bank* v. *Kennedy*, 167 U. S. 362; *Concord Nat. Bank* v. *Hawkins*, 174 U. S. 364; *Merchants' Nat. Bank* v. *Wehrmann*, 202 U. S. 295.

The decision below was based upon principles of state law which are contrary to those recognized in this court.

The National Bank Act provides a complete system for the establishment and government of national banks. *Cook County Bank* v. *United States*, 107 U. S. 445, 448.

In so far, therefore, as the Court of Appeals sought to ignore the decisions of this court, by applying a doctrine contrary to that which is recognized here, it disregarded the statute.

The necessity for uniform construction has been recognized by this court. *Tullock* v. *Mulvane*, 184 U. S. 497, 505; *Yates* v. *Jones Nat. Bank*, 206 U. S. 158.

The National Bank Act is the supreme law of the land to national banks, and a state statute which attempts to authorize the exercise of a power or impose a liability not permitted by that act, is a nullity. *Farmers' Nat. Bank* v. *Dearing*, 91 U. S. 29; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 237. *People's Bank* v. *National Bank*, 101 U. S. 181, and *Cochran* v. *United States*, 157 U. S. 286, relied on below, are not applicable; and see *Bank of Genesee* v. *Patchin Bank*, 13 N. Y. 309, 314; *Commercial Nat. Bank* v. *Pirie*, 82 Fed. Rep. 799; *Bowen* v. *Needles Nat. Bank*, 94 Fed. Rep. 925.

The method actually employed cannot be disregarded, nor can a void and unlawful transaction be rendered valid merely because the result might have been attained in a lawful manner.

*Mr. John W. Hutchinson, Jr.*, and *Mr. Julius M. Mayer*, with whom *Mr. H. Snowden Marshall* was on the brief, for defendant in error:

The defendant in error is entitled to recover the $10,000

which it gave up on the faith of the guaranty and which was received by the guarantor.

An action for money had and received is exactly appropriate. 27 Cyc. 858; *Gaines* v. *Miller*, 111 U. S. 395, 397.

While it is conceded that under the decisions of this court a party cannot recover upon an *ultra vires* contract it has never been held in this court or in any other jurisdiction that a party can retain what it has received under such a contract, and refuse to perform the contract on the ground that it is *ultra vires*. *Logan County Bank* v. *Townsend*, 139 U. S. 67; *Aldrich* v. *Chemical National Bank*, 176 U. S. 618.

As said in the opinion of the Court of Appeals, whatever the difference of view there may be as to the effect of *ultra vires* on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract, and see also *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 644; *United States* v. *State Bank*, 96 U. S. 30, 36; *Louisiana* v. *Wood*, 102 U. S. 294; *Pullman's Car Company* v. *Transportation Co.*, 171 U. S. 138, 151.

The transaction was not such a contract of guaranty as is forbidden to be made by national banks, but was a written promise made to a third party for the purpose of collecting an existing debt and is therefore an enforceable obligation.

The lack of power, however, to guarantee the payment of obligations, which is prohibited because not expressly conferred, refers to the business of guaranteeing debts, or to a transaction the very purpose of which is to guarantee for profit as a commercial risk the payment of another's obligation.

It is, however, the duty of a national bank to collect the debts owing to it, and, in that connection, it has frequently become necessary for a national bank to engage in transactions or to accept payment or security in a manner and of a character not permissible as an original or initial transaction. *American National Bank* v. *National Wall Paper Co.*, 77 Fed. Rep. 85; *Morris* v. *Third National Bank of Springfield*, 142 Fed.

Rep. 25; *National Bank* v. *Case*, 99 U. S. 628; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122; *Cockrill* v. *Abeles*, 86 Fed. Rep. 505; *Central R. R. & Banking Co. of Georgia* v. *Farmers' Loan & Trust Company*, 114 Fed. Rep. 263. *People's Bank* v. *National Bank*, 101 U. S. 181, and *Cochran* v. *United States*, 157 U. S. 286, are decisive upon the question at bar.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was commenced in the Supreme Court of New York by the Receiver of the Cooper Exchange Bank, a New York corporation, against the Citizens' Central National Bank of New York, a national bank corporation formed by the consolidation (Rev. Stat., §§ 5220 and 5221) of the Central National Bank of the city of New York with the National Citizens' Bank of the same city. The action was dismissed on demurrer to the complaint, and that judgment was affirmed in the Appellate Division. 116 App. Div. 404. But on appeal to the highest court of New York the judgment was reversed, 190 N. Y. 417, and the cause was remitted to the Supreme Court of that State for judgment in accordance with the opinion of the former court.

The complaint alleges—

That the defendant, the Citizens' National Bank of New York, by the consolidation referred to, acquired all the assets and became subject to the liabilities of the Central National Bank of that city;

That on and prior to January 4th, 1904, one Michael Samuels was indebted to the Central National Bank in the sum of $10,000;

That "at the instance and request of Samuels, trading under the name of Mikael Samuels & Co., *and the Central National Bank of the city of New York*," the Cooper Exchange Bank loaned and advanced to the former the sum of $12,000, Samuels executing his written obligation, dated January 4th,

1904, to return or repay the same on or before four months after date with interest, and *at the same time* the Central National Bank of the city of New York, under seal, executed a written guaranty for the payment of the debt, as follows: "For and in consideration of one dollar and other good and valuable considerations, the Central National Bank of the city of New York hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of twelve thousand dollars, made this day to Mikael Samuels & Co. by the Cooper Exchange Bank;"

That previous to the obtaining of said loan of $12,000, Samuels "agreed with the said Central National Bank to pay to it the said sum of $10,000 *of the said* $12,000 *so obtained*, and the said loan was obtained by the said Mikael Samuels and was guaranteed by the said Central National Bank *in order that the said Central National Bank might obtain the said sum of* $10,000, which it did receive and which was owed to it by the said Samuels;"

That previous to the maturity of the loan, namely, on January 30th, 1904, only a few weeks after the loan was made, Samuels was adjudged a bankrupt; and,

That no part of said loan had ever been paid, except $1,000, which was paid April 7th, 1906.

The Court of Appeals of New York—Cullen, C. J., delivering the opinion—held and the counsel for the Cooper Exchange Bank conceded in that court, that no recovery could be had against the guaranteeing bank in excess of the amount actually received by it out of the $12,000 loaned, as above stated. 190 N. Y. 417. The case being remitted to the inferior state court, judgment was therefore rendered against the defendant only for $10,000, with interest from January 4th, 1904, with costs in all courts.

The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its power, was in violation of the National Banking Act, and, therefore, could not be made the foundation of an

action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the $10,000 *of the* $12,000 actually paid to Samuels *at its request and on its guaranty*. The law would be very impotent to do justice if it could not, under those circumstances and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. Samuels owed the Central National Bank $10,000, and—with knowledge perhaps of his financial condition—he was put forward by that bank to obtain $12,000 from the Cooper Exchange Bank so that it could get $10,000 *out of that sum*, for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. All this, it may be observed, occurred under a previous agreement between the Central National Bank and Samuels, that that bank was to have $10,000 of the $12,000 in discharge of its claim upon him. In short, the Central National Bank, by means of the device mentioned, got $10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief.

In *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 74, it appears that a national bank purchased, at a stipulated price, certain municipal bonds, which it agreed to return to the seller upon demand or replace them at the same or a less price. Demand was subsequently made on the bank to return or replace the bonds according to the agreement. But it failed to do either, and when sued for the value of the bonds it

pleaded, as a defense, the absence, under the law of its creation, of any authority or power on its part to make the above contract. This court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and, at the same time, refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase may be pleaded in bar of all claims against it based *upon the contract*—and we are assuming, for the purposes of this case, that it may be—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.' "

The case of *Aldrich* v. *Chemical National Bank*, 176 U. S. 618, is equally in point. A vice-president of a national bank, without authority from it, borrowed money from another national bank, and placed the amount in still another bank to the credit of the bank which he assumed to represent in the transaction. The national bank in whose name the

money was deposited drew the money out by check and applied it in discharge of its own valid obligations; and when it was sought to hold it liable, the defense, in part, was that the original borrowing was not only unauthorized by it, but was in violation of the National Banking Act. Upon an extended review of the authorities this court said: "As the money of the Chemical Bank was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and, as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. . . . If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank, by its check upon the Chemical Bank, had drawn the whole $300,000 at one time, and now had the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could

use in its business and for its benefit money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

These views are supported by many other adjudged cases. In *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court, speaking by Mr. Justice Gray, said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract." So, in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, the court, speaking by Mr. Justice Peckham, said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it." Other cases are cited in the margin.[1]

[1] *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 644; *United States* v. *State Bank*, 96 U. S. 30, 36; *Louisiana* v. *Wood*, 102 U. S. 294; *Parkersburg* v. *Brown*, 106 U. S. 487, 503; *Read* v. *Plattsmouth*, 107 U. S. 568; *Dittey* v. *Dominion National Bank of Bristol*, 43 U. S. App. 613, 615; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Massachu-

We need not go farther. It is entirely clear that the judgment against the defendant bank—which came into the possession of the property, and was subject to the liabilities of the Central National Bank—was consistent with sound legal principles and was intrinsically right, even if the guaranty in question was beyond the power of the guaranteeing bank, under the national banking statutes. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, the judgment can be supported as based wholly on the implied contract, which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower.

The judgment must be affirmed.

*It is so ordered.*